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anuary 30, 1985

Title: Lake Coal Company, Inc., Petitioner
v.
Roberts & Schaefer Company

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Polly, Ronald G.

Counsel for respondent: Combs, C. Kilmer

ntry	Date	Note	Proceedings and Orders
1	Jan 30 1985	G	Petition for writ of certiorari filed.
2	Mar 6 1985		DISTRIBUTED. March 22, 1985
3	Mar 7 1985	X	Brief of respondent Roberts & Schaefer Co. in opposition filed.
4	Mar 25 1985		Petition GRANTED. Justice Powell DUT.
			**********
5	Mar 11 1985		Application of respondent to vacate stay filed.
6	Feb 22 1985		Response of Lake Coal Company filed.
7	Mar 25 1985		Denied by O'Connor, J.
9	Apr 22 1985		Order extending time to file brief of petitioner on the merits until May 30, 1985.
10	May 28 1985		Brief of petitioner Lake Coal Company, Inc. filed.
11	May 28 1985		Joint appendix filed.
12	Jun 6 1985		Record filed.
13	Jun 6 1985		Certified copy of original record & proceedings received.
14	Jun 25 1985		Brief of respondent Roberts & Schaefer Company filed.
15	Jul 19 1985		SET FOR ARGUMENT, Tuesday, October 15, 1985. (2nd case).
16	Aug 7 1985		CIRCULATED.
17	Oct 5 1985	X	Reply brief of petitioner Lake Coal Company, Inc. filed.
18	Oct 15 1985		ARGUED.

84-1240

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC. - - - Petitioner

versus

ROBERTS & SCHAEFER COMPANY - - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision of the United States Court of Appeals for the Sixth Circuit conflicts with the applicable decisions of this Court where the district court's stay of federal jurisdiction avoids piecemeal litigation and duplicative judicial time and effort?

II. Whether the United States Court of Appeals for the Sixth Circuit erred in reversing the stay order entered by the district court wherein the federal action involves only questions of state law, there is no federal policy regarding the specific case requiring exercise of jurisdiction and the stay avoids piecemeal litigation?

III. Whether the decision of the United States Court of Appeals for the Sixth Circuit, misconstrued the district court's placing of the burden of persuasion, on the motion to stay, and is therefore, in conflict with applicable rulings of this Court and other circuit courts of appeal?

PARTIES TO THE PROCEEDING

PETITIONER (Defendant-Appellee)	Lake Coal Company, Inc.
RESPONDENT (Plaintiff-Appellant)	Roberts & Schaefer Company

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

LAKE COAL COMPANY, INC. - - - *Petitioner*

v.

ROBERTS & SCHAEFER COMPANY - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF JURISDICTION

On November 20, 1984, the United States Court of Appeals for the Sixth Circuit reversed and remanded the order entered by the District Court for the Eastern District of Kentucky staying exercise of jurisdiction, pending adjudication of the parallel state action. (Appendix p. 1a).

A timely petition for rehearing, filed with the appellate court was denied on December 21, 1984. (Appendix p. 7a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On September 14, 1981, the parties herein entered into a written contract for Roberts & Schaefer Company (hereinafter R&S) to construct a closed circuit

coal washing facility for Lake Coal Company, Inc. (hereinafter Lake) in Letcher County, Kentucky. Prior to the date of contract, construction was begun on the facility by Langley & Morgan Corporation and/or Darby Construction Company, wholly owned domestic subsidiaries of Elgin National Industries, Inc., the parent corporation of R&S. The facility was to be completed no later than April 1, 1982. However, due to negligence on the part of Elgin National Industries, Inc., and R&S in the design of the facility, and negligence, concealment, misrepresentation and fraud, or breach of duties or contract on the part of R&S, Elgin National Industries, Inc., Langley & Morgan Corporation and/or Darby Construction Company, in the construction and installation of the facility, it failed to operate, initially due to cracking and total loss of water from the large concrete static thickener used for clarifying the plant water. The facility has only recently been made operational through the efforts of Lake alone.

On November 12, 1982, Lake filed its complaint in state court against R&S, Elgin National Industries, Inc., Langley & Morgan Corporation and Darby Construction Company alleging alternative causes of action: breach of contract; negligent design, construction and installation of the facility; misrepresentation, concealment and fraud; and, breach of expressed and implied warranties. On December 1, 1982, R&S and Elgin National Industries, Inc., filed a petition for removal with the United States District Court for the

Eastern District of Kentucky alleging that Lake did not have a valid claim against the domestic subcontractors and therefore, they were fraudulently joined in the suit solely to defeat jurisdiction. The action was docketed. On December 23, 1982, Lake filed a motion to remand and the issue of the validity of Lake's cause of action in the state court suit against Darby Construction Company and Langley & Morgan Corporation was exhaustively briefed and argued. On February 15, 1983, the district court found that the domestic subcontractors were not fraudulently joined and remanded the action to state court.

Having failed in its efforts to remove this action to federal court, R&S, alone, filed a complaint against Lake in the United States District Court for the Eastern District of Kentucky on April 6, 1983. In order to obtain diversity jurisdiction, the complaint omitted the domstic subcontractors, Langley & Morgan Corporation and Darby Construction Company, as parties. The complaint, a duplication of R&S's counterclaim in the state action, was filed as a defensive tactic to encumber Lake with duplicative litigation.

On April 29, 1983, Lake filed a motion to dismiss or stay the federal action. In the numerous briefs filed in support and in opposition to this motion, the application of the balancing test set out in *Colorado River Water Conservation District* v. *United States,* 424 U. S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), and the Supreme Court's rulings in *Brillhart* v. *Excess Insurance Company,* 316 U. S. 491, 62 S. Ct. 1173,

86 L. Ed. 1620 (1942); *Will* v. *Calvert Fire Ins. Co.*, 437 U. S. 655, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978); and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation*, — U. S. —, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983), were exhaustively briefed and argued.

On July 15, 1983, the district court entered an order which stated:

> "in the interest of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal [sic] litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court." (Appendix p. 6a).

The district court's order was appealed to the United States Court of Appeals for the Sixth Circuit by R&S. After docketing, R&S filed a motion for summary reversal, arguing that the district court had improperly applied *Colorado River Water Conservation District* v. *United States, supra,* in allocating the burden of persuasion on the motion to R&S. On November 3, 1983, this motion was denied.[1] However, on November 20, 1983, the Court of Appeals entered an order finding that the district court had erred in assigning the burden of persuasion requiring "R&S to show good cause why concurrent jurisdiction should be exercised" and that "exceptional circumstances" counseling against exercise of federal jurisdiction do

[1]Jones, Krupansky and Wellford, Circuit Judges, comprised the panel.

not exist in this case. (Appendix p. 1a). Additionally, the Court of Appeals found that the stay did not avoid piecemeal litigation because Lake did not show "that it has an arguably valid claim under Kentucky law against the non-signatory contractors". (Appendix pp. 3a-5a). The appellate court therefore, reversed and remanded the district court's stay order with instruction to exercise jurisdiction.[2]

On December 21, 1984, a timely petition for reconsideration was denied. (Appendix p. 7a). However, on January 4, 1984, upon motion of Lake, the Court of Appeals entered an order staying its mandate for thirty (30) days pending application for writ of certiorari to the Supreme Court. (Appendix p. 8a).

REASONS FOR ALLOWANCE OF THE WRIT

I. The Decision of the United States Court of Appeals for the Sixth Circuit Conflicts With the Applicable Decisions of This Court Where the District Court's Stay of Federal Jurisdiction Avoids Piecemeal Litigation and Duplicative Judicial Time and Effort.

In the case at bar, all the parties in the federal action are included in the state action; some parties included in the state action, however, are omitted in the federal action. The issues in the state action are broader and more inclusive than those in the federal action and the allegations in the federal action are included in the issues presented for adjudication in the state action. Also, the state courts of Kentucky afford

[2]Keith, Contie, Circuit Judges, and Peck, Senior Circuit Judge, comprised the panel.

an adequate forum for this litigation and there are no rights or remedies available to R&S in the federal action which are not also available in the state action. Recognizing these factors, the district court held that in fairness to all parties and to avoid piecemeal litigation and duplicative judicial time and effort the federal action should be stayed. (Appendix p. 6a). The district court, applying the "balancing test" set out in *Colorado River Water Conservation District* v. *United States, supra,* found that these exceptional circumstances counselled against exercise of jurisdiction despite the court's "virtually unflagging obligation" to exercise jurisdiction.

However, the United States Court of Appeals for the Sixth Circuit held that "exceptional circumstances did not exist in this action." Particularly, the court found that piecemeal litigation may not be avoided by the stay of federal jurisdiction because R&S could file a separate action in the state courts against the subcontractors if held liable to Lake for damages and further, Lake had not shown that it had an arguably valid claim under Kentucky law against the subcontractors in the state action. Since a judgment in the federal action would completely decide all issues between all parties, there was no piecemeal litigation to avoid. (Appendix pp. 2a-5a).

Lake respectfully contends that the Courts of Appeals' opinion conflicts with the applicable decisions of this Court and other circuit courts of appeal. The appellate court overlooked the fact that the state action was more inclusive of parties and issues than the federal action because of its preoccupation with an imagined possible future action by R&S against the subcontractors, its sibling corporations. Imaginary cases do not affect the actual circumstances that piecemeal litigation is avoided in the instant case by stay of the federal suit. Moreover, it is most doubtful that R&S would file an action against its sibling corporations in state court even if it is held liable to Lake for damages as the Sixth Circuit speculated. That point is borne out by the fact that R&S has filed no cross-claim against its sibling corporations, co-defendants, in the state action.

If the federal suit is not stayed and even if judgment is entered, it is fact, not fiction, that the parallel state action will nevertheless proceed against the subcontractors, Darby Construction Company and Langley & Morgan Corporation, and the parent corporation, Elgin National Industries, Inc., upon the same facts and law as in the instant case. This is precisely the piecemeal litigation held proper for avoidance by *Colorado River Water Conservation District* v. *United States, supra,* wherein this Court reversed the Seventh Circuit Court of Appeals and affirmed the district court's dismissal of the federal suit. Citing *Brillhart* v. *Excess Insurance Company, supra,* this Court held that the desirability of avoiding piecemeal litigation

was an exceptional circumstance justifying exercise of jurisdiction.[3] The Court stated:

> "This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with *avoiding the generation of additional litigation* through permitting inconsistent dispositions of property." (emphasis added). at p. 819.

In the case at bar, a determination of issues involving the design, installation and construction of the wash plant facility will be required in both the federal and state courts unless the federal action is stayed because the state action is more inclusive in patries thereto and issues therein. A judgment in the federal action resolves only one facet of the dispute and leaves the remaining issues for adjudication in the state court. Lake respectfully contends that the stay of the federal action avoids this piecemeal adjudication of this case and thereby avoids duplicative judicial time and effort. This exceptional circumstance under the facts herein presented counsels against exercise of jurisdiction.

In *Reiter* v. *Universal Marion Corporation,* 173 F. Supp. 13 (D.C. 1959), a stockholder derivative suit,

[3]This Court in *Brillhart* v. *Excess Insurance Company, supra,* warned "ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court, presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of state court litigation should be avoided." at p. 495.

the court stayed federal jurisdiction holding that piecemeal litigation of underlying disputes would result unless the concurrent federal action was stayed because all of the parties in the state court action were not before the federal court. Similarly, in *Brendle* v. *Smith,* 46 F. Supp. 522 (S.D. N.Y. 1942), the court stayed federal jurisdiction holding that piecemeal litigation would result unless the federal action were stayed because the state action was broader and more inclusive in regard to the parties thereto and the issues therein. In *P.P.G. Industries, Inc.* v. *Continental Oil Company,* 478 F. 2d 674 (5th Cir. 1973), the Fifth Circuit Court of Appeals faced with the very issue presented herein, stayed the federal action stating;

> "The advantages of obtaining in one suit or the other joinder of more parties affected by the controversy, even though they are not indispensible parties to the litigation, may be decisive in a given case." at p. 683.

In the case at bar the stay of the federal action permits all issues arising out of the design, installation and construction of the wash plant facility to be determined between all parties in one action and thereby avoids piecemeal litigation and duplicative judicial time and effort. These exceptional circumstances counsel against exercise of jurisdiction. The appellate court's contrary ruling conflicts with this Court's decision in *Colorado River Water Conservation District* v. *United States, supra,* and the Fifth Circuit's ruling in *P.P.G. Industries, Inc.* v. *Continental Oil Company, supra.*

The Court of Appeals failed to reach this conclusion because it misconceived that it was to determine whether Lake had a valid cause of action against the subcontractors in the state suit. In the first instance, the validity of Lake's claim under Kentucky Law was not an issue presented on appeal to the Sixth Circuit. The issue presented for appeal was whether the district court had abused its discretion, not the merits of Lake's case in state court. There was no claim raised by R&S on appeal that Lake did not have an arguably valid claim against the subcontractors in the states' action. Nor, was there any discussion by any party of the relevant facts or applicable law whereby the appellate court could make a determination on this issue.[4] Moreover, the Court of Appeals apparently overlooked the fact that the issue of the validity of Lake's cause of action against the subcontractors in the state claim was presented, exhaustively briefed, argued and decided by the district court in a separate removal action on motion to remand. The district

[4]In its petition for reconsideration Lake cited, without discussion, the cases, briefed and argued to the district court, which demonstrate the validity of its claim against the subcontractors for negligence, concealment, misrepresentation and fraud and the status of Lake as an intended third party beneficiary of the contract between the subcontractors and R&S. The appellate court apparently overlooked these cases because of its preoccupation with the fact that the subcontractors were non-signatory to the September 1981 contract between Lake and R&S. Lake respectively submits that it is not necessary for the subcontractors to be signatory to said contract in order to have an arguably valid claim against them, in one or more of the alternative causes of action set out in its complaint.

court in finding that the subcontractors were not fraudulently joined in the state action necessarily determined that Lake had an arguably valid claim against them in the state court suit. Lake respectfully contends that the appellate court's contrary finding, without the benefit of the relevant facts or arguments as presented to the district court, constitutes error, and calls for an exercise of this Court's power of supervision. Lake, therefore, respectfully requests that its petition for certiorari be granted.

II. The United States Court of Appeals for the Sixth Circuit Erred in Reversing the Stay Order Entered By the District Court Wherein the Federal Action Involves Only Questions of State Law, There Is No Federal Policy Regarding the Specific Case Requiring Exercise of Jurisdiction and the Stay Avoids Piecemeal Litigation.

Lake respectfully contends that the appellate court failed to recognize the significance of the fact that the federal action, based on diversity jurisdiction, concerned only issues of state law and there was no federal policy regarding the specific case requiring exercise or stay of federal jurisdiction present. These unique facts distinguish the case at bar, factually, from both *Colorado River Water Conservation District* v. *United States, supra, and Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra.*[5]

[5]This is particularly important since this Court has held that the balancing of exceptional circumstances against exercise of jurisdiction must be done on a case by case basis. See *Colorado River Water Conservation District* v. *United States, supra,* pp. 819-820.

In *Colorado River Water Conservation District* v. *United States, supra,* this Court noted that the McCarran Act expressed a federal policy favoring the determination of water rights by state courts. Accordingly, this Court affirmed the district court's dismissal of the federal action in deference to the parallel state action. See *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company,* 103 S. Ct. at p. 941, footnote 29. Similarly, in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra,* this Court noted that the arbitration act expressed a federal policy requiring that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." 103 S. Ct. at p. 942. It stated that the presence of federal law issues must always be a major consideration weighing against surrender of jurisdiction. Because this Court found "that there was substantial doubt" that the construction company could obtain an order compelling arbitration in the state court, it reversed the district court's stay order and remanded the action with instructions to exercise jurisdiction thereby carrying out the federal policy promoting arbitration of disputes.

In *Tai Ping Insurance Co. LTD.* v. *M/V Warschau,* 731 F. 2d 1141 (5th Cir. 1984), the Fifth Circuit Court of Appeals held that this Court's essential concern in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra,* was not the exercise of federal jurisdiction but rather that the intent of the federal law not to delay arbitration required exercise

of jurisdiction therein. See also, *Southland Corp.* v. *Keating,* — U. S. —, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

In the case at bar there are no issues of federal law, nor is there an expressed federal policy requiring exercise of jurisdiction. Lake respectfully contends that these unique factors are significant and, when coupled with the fact that the stay avoids piecemeal litigation and duplicative judicial time and effort, counsel against exercise of federal jurisdiction.

Although this Court has not previously ruled on a case based on diversity jurisdiction where there is no federal policy regarding the specific case requiring exercise or stay of jurisdiction, this Court has noted the importance of these factors. In *Brillhart* v. *Excess Insurance Company, supra,* this Court stated that ordinarily it is uneconomical and vexatious to proceed with the exercise of federal jurisdiction where a concurrent action is pending in the state court *and the federal action is governed by state law.*[6]

Furthermore, in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra,* the Court indicated that, although rare, the presence of state law issues may weigh in favor of the surrender of jurisdiction to the state court. Accord, *Gilbane Building Company* v. *The Nemours Foundation,* 568 F. Supp. 1085 (D. Del. 1983).

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[6]Although a declaratory judgment action, it is cited with approval in *Colorado River Water Conservation District* v. *United States, supra,* at p. 878, and *Will* v. *Calvert Fire Ins. Co., supra,* at p. 662.

It is not necessary for the state law to be unsettled in order for these factors to be significant, as the appellate court incorrectly held.[7] Rather, it is apparent that it is the state court's greater familiarity and expertise with state law in all instances which gives this factor significance and weighs against exercise of jurisdiction. See, *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra,* 103 S. Ct. at p. 937.[8]

Lake therefore, respectfully contends that when these factors are coupled with the fact that the stay of federal jurisdiction avoids piecemeal litigation and duplicative judicial time and effort, as previously discussed, that exceptional circumstances existed which counsel against exercise of jurisdiction as held by the district court.

This case provides this Court with an opportunity to settle under what circumstances the presence of state-law issues weigh in favor of the surrender of jurisdiction as alluded to by this Court in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Cor-*

[7]If the state law was unsettled, then the stay would have been appropriate under the doctrine of abstention. *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959). See also *Colorado River Water Conservation District* v. *United States, supra,* at pp. 814-815.

[8]Therein, this Court noted that the federal policy favoring determination of water rights by state courts was due in part to Congress' judgment that "the field of water rights is one peculiarly appropriate for comprehensive treatment *in the forum having the greatest expertise assisted by state administrative officers acting under state courts.* (emphasis added). 103 S. Ct. at p. 937.

poration, supra. Lake therefore, respectfully submits that its petition for certiorari should be granted.

III. The Decision of the United States Court of Appeals for the Sixth Circuit, Misconstrued the District Court's Placing of the Burden of Persuasion, On the Motion to Stay, and Is Therefore, In Conflict With Applicable Rulings of This Court and Other Circuit Courts of Appeal.

Like respectfully contends that the Court of Appeals in its opinion filed November 20, 1984, misconstrued that "the district court's order indicates that the court required R&S to show good cause why concurrent jurisdiction should be exercised." The appellate court overlooked the specific language of the district court's stay order which set out the court's rationale for the stay, as follows:

> "It is hereby ordered, that in the interest of fairness to all concerned, as well as to avoid multiplicity of judicial time and effort, and piece-meal [sic] litigation, this action is now stayed. . ." (Appendix p. 6a).

It is clear that the district court ruled that the avoidance of piecemeal litigation counselled against exercise of jurisdiction in this case and that no countervailing reasons requiring exercise of jurisdiction had been shown to exist by R&S. The district court's reference to fairness to all parties concerned indicates that the district court considered whether countervailing reasons existed for exercise of jurisdiction even after it had been shown that exceptional circumstances which counselled against exercise of jurisdiction ex-

isted. However, the Court of Appeals ignored the district court's rationale and seized upon the language in the order which did not relate to the allocation of the burden of proof.[9] The district court's statement, upon which the appellate court based its finding, is similar to that exployed by the Fifth Circuit in *P.P.G. Industries, Inc.* v. *Continental Oil Company, supra.* Therein, the court, after concluding that exceptional circumstances counselling against exercise of jurisdiction, existed, went on to state:

> "nothing has come to the attention of this Court, which would indicate a stay would be unfair to P.P.G."

Similarly, in *Calvert Fire Insurance Company* .v. *American Mutual Reinsurance Company,* 600 F. 2d 1228 (7th Cir. 1979), the court stated:

> "Preventing a vexatious suit is similar to the interests in avoiding piecemeal litigation mentioned in *Colorado River, supra,* at 818, and would clearly justify federal deferral to the parallel state proceeding *unless there exists strong countervailing reasons* for the federal court to decide the federal suit without further delay such as prejudice to Calvert or compelling policy reasons to secure an immediate federal court decision." (emphasis added). at p. 1234.

Even in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra,* this Court noted

[9]The district court order stated "no good cause has been shown to justify litigating these same issues simultaneously in two different judicial systems." (Appendix p. 6a).

that not only had the hospital failed to demonstrate the existence of exceptional circumstances counselling against exercise of jurisdiction, but that the coustruction company had also shown countervailing factors indicating that federal jurisdiction should be exercised without delay.

In the case at bar, R&S raised no indication that countervailing factors exist requiring exercise of jurisdiction without delay even though Lake had demonstrated that exceptional circumstances which counselled against that exercise did exist. Instead, R&S only argued that it had an absolute right to a federal forum. As this Court is well aware, 28 U.S.C. §1332 grants only a statutory privilege of access to a federal court which is not absolute. *Brillhart* v. *Excess Insurance Company, supra.*

The record demonstrates that the district court assigned the burden of persuasion to Lake. It properly applied the "balancing test" in *Colorado River Water Conservation District* v. *United States, supra,* and, in its discretion, concluded that "in the interest of fairness to all parties concerned as well as to avoid multiplicity of judicial time and effort and piecemeal litigation" the federal action should be stayed. The appellate court's contrary ruling is in conflict with the applicable ruling of other circuit courts, and the decision of this Court in *Colorado River Water Conservation District* v. *United States, supra, and Moses H. Cone Memorial Hospital* v. *Mercury Construction Cor-*

poration, supra. Lake therefore, respectfully submits that its petition for certiorari should be granted.

CONCLUSION

On January 4, 1985, the United States Court of Appeals for the Sixth Circuit entered an order staying its mandate pending application for writ of certiorari to the Supreme Court. (Appendix p. 9a). Lake respectfully contends that this action by the appellate court in staying the enforcement of its order indicates that it has some question as to whether its decision is consistent with the rulings of this Court and other circuit courts of appeal or that the important issue of the application of federal law presented herein should be settled by decision of this Court. Moreover, this petition for writ of certiorari should be granted because the action of the Court of Appeals frustrates the district court in its proper application of the Supreme Court decision.

Therefore, Lake respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY - - *Plaintiff-Appellant*

v.

LAKE COAL COMPANY, INC. - - - *Defendant-Appellee*

On Appeal From the United States District Court for the Eastern District of Kentucky

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ORDER — Filed November 20, 1984

Before: KEITH and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

CONTIE, Circuit Judge. Roberts & Schaefer Company (R&S) appeals from a district court order staying proceedings in this diversity action pending the outcome of a concurrent state court action.[1] We reverse and remand with instructions for the district court to exercise jurisdiction.

In September 1981, the parties executed a written contract under which R&S would construct a coal washing plant for Lake Coal Company, Inc. (Lake) in Letcher County, Kentucky. R&S employed two subcontractors. On November 12, 1982, Lake filed a complaint in state court against R&S and the subcontractors alleging breach of contract, negligent design, construction and installation, breach of warranties and fraud. R&S asserted a counterclaim for the contract price.

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[1]The district court's order is appealable. *See Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, __ U. S. __, 103 S. Ct. 927, 933-35 (1983).

Although the presence of the subcontractors as parties destroyed complete diversity, R&S attempted to remove the action on the ground that the subcontractors had been joined as defendants solely for the purpose of defeating federal diversity jurisdiction. The district court disagreed with R&S and remanded the action to the state court because federal jurisdiction was absent.

R&S then filed this action against Lake, essentially pleading the counterclaim that it had filed in state court. The subcontractors were not joined. Lake answered and filed its counterclaim for breach of contract, negligence, breach of warranties and fraud. Lake then moved to dismiss or to stay this action, which now involves the same issues as the state court action. The district court stayed this action pending the outcome of the state court proceedings because "no good cause has been shown to justify litigating the same issues simultaneously in two different judicial systems" (App. at 294) and because fairness to the parties and the avoidance of multiplicitous and piecemeal litigation counseled against exercising concurrent jurisdiction.

The general rule is that the prior pendency of a state court action does not bar concurrent federal proceedings on the same matter. *See Will* v. *Calvert Fire Insurance Co.*, 437 U. S. 655, 662 (1978); *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 817 (1976). Indeed, federal courts have a "virtually unflaging obligation" to exercise their jurisdiction. *Moses H. Cone Hospital* v. *Mercury Construction Corp.*, ____ U. S. ____, 103 S. Ct. 927, 936 (1983); *Colorado River Water*, 424 U. S. at 817. Nevertheless, a district court may sometimes decline to exercise jurisdiction where a state court action on the same issues is pending. The purpose of this limited exception to the duty to exercise jurisdiction is to conserve judicial resources and to promote comprehensive disposition of litigation. *See Colorado River Water*, 424 U. S. at 817. The exception is even narrower than the abstention doctrine. *Id.*, at 818.

In deciding whether or not to exercise jurisdiction in this type of case, a district court must determine whether there exist "exceptional circumstances" that justify not doing so. *See Moses H. Cone Hospital*, 103 S. Ct. at 942. Since "only the clearest of justifications," *Id.*; *Colorado River Water*, 424 U. S. at 819, will warrant a stay, the burden of persuasion is upon the party seeking the stay. Moreover, the parties agree that a district court must evaluate several factors, no one of which is determinative, in reaching its decision: (1) whether the state action is an action *in rem*, (2) whether the federal and state actions have progressed to the same stage,[2] (3) whether the federal forum is convenient, (4) whether the state proceedings are adequate, (5) whether the substantive claims involve federal or state law and (6) whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed.

We hold that the district court erred in assigning the burden of persuasion. Although the burden was upon Lake to show "exceptional circumstances" amounting to the "clearest of justifications" for not exercising federal jurisdiction, the district court's order indicates that the court required R&S to show good cause why concurrent jurisdiction should be exercised. This error alone is sufficient to warrant reversal.

Furthermore, we hold that "exceptional circumstances" do not exist in this case. First, the state court action is not an action *in rem*. Second, the federal and state actions

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[2]The progress of the federal and state actions is more relevant than the times of filing of the respective complaints. See *Moses H. Cone Hospital*, 103 S. Ct. at 940.

have progressed to about the same stage of discovery. Third, the federal court is only about fifty-three miles from the construction site. Fourth, both the federal and state courts appear capable of adjudicating the parties' claims and affording appropriate relief. Thus, none of the first four factors enumerated above augurs in favor of staying the federal action pending the outcome of the state proceedings.

Fifth, although both the federal and state actions involve solely questions of state law, Lake has not demonstrated either that the state law issues are so difficult or that state law is so unsettled that state court expertise is required. Accordingly, the fifth factor listed above does not constitute an exceptional circumstance justifying a refusal to exercise federal jurisdiction.

The final factor is whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed. Lake contends that piecemeal litigation will result if the federal action is not stayed because the subcontractors, whom Lake sued in state court, are not parties to the federal action. Having reviewed the arguments and the record submitted by the parties, we hold that Lake has not shown either that piecemeal litigation likely will occur if the federal action is not stayed or likely will be avoided if the federal action is stayed.

As to the former point, it is noteworthy that the subcontractors are not parties to the September 1981 contract. Moreover, Lake has not shown that it has an arguably valid claim under Kentucky law against the non-signatory subcontractors. In short, Lake has not shown that the absence of the subcontractors in the federal action will result in Lake filing a separate action against them. Moreover, piecemeal litigation could occur in the state courts in the form of a separate action by R&S against the subcontractors if R&S is held liable to Lake for damages. Hence,

piecemeal litigation may not be avoidable even if the federal action is stayed.

The judgment of the district court is REVERSED and the case is REMANDED with instructions to exercise jurisdiction.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff,*

v.

LAKE COAL COMPANY, INC., - - - *Defendant.*

ORDER — Filed July 15, 1983

The defendant has moved the Court to dismiss or stay this action pending resolution of an action involving the same issues and the same parties, et al., in Letcher Circuit Court (Civil Action No. 82-CI-414). The Court has considered the parties' responses and replies to responses to defendant's motion herein and is of the opinion that no good cause has been shown to justify litigating these same issues simultaneously in two different judicial systems. The Court being so advised,

IT IS HEREBY ORDERED, that in the interests of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court.

This the 14th day of July, 1983.

(s) G. Wix Unthank, Judge

No. 83-5551

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERTS & SCHAEFER COMPANY - *Plaintiff-Appellant*

v.

LAKE COAL COMPANY, INC. - - *Defendant-Appellee*

ORDER — Filed Dec. 21, 1984

Before: KEITH and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

Lake Coal Company, Inc. has filed a petition for rehearing in the above-captioned case under Federal Rule of Appellate Procedure 40. This court considered the arguments made in the petition when making its original determination. The panel adheres to its decision entered on November 20, 1984. The petition for rehearing is DENIED.

Entered By Order of the Court

(s) John Hehman
Clerk

No. 83-5551

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellee,*

v.

LAKE COAL COMPANY, INC., - *Defendant-Appellant.*

ORDER — Filed January 4, 1985

Upon consideration of the appellee's motion to stay the mandate pending application for writ of certiiorari,

It is ORDERED that the motion be and it hereby is granted and the mandate is stayed until February 4, 1985.

Entered By Order of the Court.

(s) John P. Hehman
John P. Hehman, Clerk

No. 83-5551

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERTS & SCHAEFER COMPANY - *Plaintiff-Appellant,*

v.

LAKE COAL COMPANY, INC. - - *Defendant-Appellee.*

ORDER — Filed January 16, 1985

Upon consideration of the appellant's motion to reconsider this Court's order entered on January 4, 1985;

It is ORDERED that the motion be and it hereby is denied.

Entered By Order of the Court.

(s) John P. Hehman
John P. Hehman, Clerk

No. 84-1240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC. - - - Petitioner

versus

ROBERTS & SCHAEFER COMPANY - Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

24pp

QUESTIONS PRESENTED

I. Should the Court review a decision of the United States Court of Appeals for the Sixth Circuit applying to a particular set of facts this Court's clear legal standards for exercise of federal court jurisdiction concurrent with state court action, where the Courts of Appeals are not in conflict concerning those legal standards, and where the outcome of the fact-intensive analysis is of interest only to the parties and not to the public?

II. Should the Court review the decision of the United States Court of Appeals for the Sixth Circuit holding that a District Court stay of federal litigation is improper where the sole basis for the stay is the existence of concurrent state court litigation and where the party seeking the stay has failed to demonstrate exceptional circumstances supporting decline of jurisdiction?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1240

LAKE COAL COMPANY, INC. - - - *Petitioner*

v.

ROBERTS & SCHAEFER COMPANY - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, Roberts & Schaefer Company, respectfully requests the Court to deny the Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit because there are no special and important reasons to grant the Petition. The Court of Appeals' decision that the District Court improperly declined to exercise its jurisdiction due to the existence of a concurrent state court action merely involves application of well settled principles to a particular set of facts and does not involve conflict with decisions of this Court or other Courts of Appeals.

COUNTERSTATEMENT OF THE CASE

This is a diversity jurisdiction action for recovery of money due under a September 1981 contract between the parties for construction of a coal processing facility. Respondent Roberts & Schaefer Company

(R&S) employed two subcontractors for construction of the facility. Petitioner's (Lake Coal's) payment for the facility is owed to R&S, and Lake Coal has no contractual relationship with the subcontractors.

In November 1982, Lake Coal filed an action in Kentucky Circuit Court against R&S and the subcontractors, alleging breach of contract, negligent design, construction and installation, breach of warranties and fraud. Believing that the subcontractors, who are Kentucky residents, had been improperly named as parties for the sole purpose of defeating diversity jurisdiction, R&S removed to the United States District Court for the Eastern District of Kentucky. In a non-appealable remand order, the District Court disagreed with R&S as to its having carried its heavy burden of demonstrating fraudulent joinder of the subcontractors for the purpose of defeating diversity jurisdiction.

R&S immediately filed the complaint giving rise to the present action, thereby exercising its statutory right to a federal forum for its claim of money due under the contract. Lake Coal moved to dismiss or to stay the federal court case pending the conclusion of the state court case. The stay was granted, thus serving as the practical equivalent of outright dismissal of the federal court action. In its order granting the stay, the District Court improperly placed on R&S the burden of demonstrating good cause for the exercise of federal jurisdiction.

At the time of the stay, the federal action had progressed to the same early discovery stage as the state

action. The fora were equally convenient. No *res* was involved. The stay would not avoid piecemeal action. In short, there existed no reasons at all, and certainly no "exceptional circumstances," for the District Court to surrender its properly invoked jurisdiction.

R&S appealed the District Court order, and on November 20, 1984, the Court of Appeals issued its opinion that the District Court had improperly required a showing of good cause for exercise of jurisdiction [Appendix 1]. The Court of Appeals further examined the factual circumstances and determined that there existed no exceptional circumstances warranting surrender of the District Court jurisdiction. An order reversing and remanding was entered. Lake Coal's request for reconsideration was denied, and this Petition followed.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Involve Any Issue of General Importance and There Are No Special and Important Reasons to Grant the Writ.

Review on a writ of certiorari will be granted "only when there are special and important reasons therefor." Sup. Ct. R. 17.1. There are no special and important reasons to review the decision of the Court of Appeals, which merely applied to a particular set of facts decisions of this Court recognized by both parties as controlling.

It has long been established that discretionary review is limited to those matters involving questions of public importance. *Southern Power Company* v.

North Carolina Public Svc. Co., 263 U. S. 508 (1924). Where the case involved matters of fact which are "of no general importance," the Court follows the "rule of non-interference where the conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commission* v. *American Tobacco Co.,* 274 U. S. 543, 544 (1927).

As the Court expressed its policy in *Rice* v. *Sioux City Cemetery,* 349 U. S. 70, 74 (1955):

> [T]his Court does not sit to satisfy a scholarly interest . . . Nor does it sit for the benefit of particular litigants. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic [citations omitted].

See also, National Labor Relations Board v. *Pittsburgh Steamship Co.,* 340 U. S. 498 (1951).

This is a matter involving the application of clear and undisputed principles to a particular set of facts. The outcome of the matter is of interest to the litigants, but is of no general public importance, since decision herein cannot serve to do more than solve this particular controversy. Since the principles are undisputed, and they must be applied to fact situations which will vary from case to case, review herein cannot resolve other conflicts, nor can it serve to further elucidate the law.

This is not a case in which the Court of Appeals has failed to apply this Court's clearly stated principles, nor is it one in which the Court of Appeals has

so far departed from the accepted and usual course of judicial proceedings that supervision is called for. Rather, the Court of Appeals applied this Court's clear authority, cited by *both* parties as controlling, to the particular facts of the case. No "special and important reasons" for review are advanced by Petitioner; Petitioner simply disagrees with the outcome in its particular case. Given the long-standing policy concerning review, such dissatisfaction falls far short of showing any reason for the exercise of review.

Petitioner has attempted to suggest that review would resolve a conflict of authority among the Courts of Appeals, although Petitioner cites no authority supporting its claim of existence of such a conflict. In fact, examination of the lower court cases cited in the Petition reveals that no such conflict exists, since each case decided since this Court's announcements on the issue has relied on and applied those announced principles.

For example, in *Tai Ping Insurance Co., Ltd.* v. *M/V Warschau,* 731 F. 2d 1141 (5th Cir. 1984), the facts revealed a district court attempt to avoid concurrent proceedings by staying arbitration pending the outcome of the federal case. The Court of Appeals, relying on the same authority utilized by the Sixth Circuit in the present case, reversed that stay, thus *requiring* the two matters to proceed concurrently.

P.P.G. Industries, Inc. v. *Continental Oil Company,* 478 F. 2d 674 (5th Cir. 1973), although predating this Court's clearest statements of the relevant principles,

actually applied those principles. In that case, the Court of Appeals approved of a stay of the federal court proceedings, but it did so on facts showing clear exceptional circumstances: The District Court action was one for a declaration of rights *and* the concurrent state court action was *in rem*. Thus, this case in no way supports Petitioner's position.

It is particularly curious that Lake Coal has cited *Gilbane Bldg. Co.* v. *The Nemours Foundation,* 568 F. Supp. 1085 (D. Del. 1983). In that case, the District Court applied the standards prescribed in *Colorado River Water Conservation District* v. *United States,* 424 U. S. 800 (1976), the same standards utilized by the Court of Appeals in the present case. The *Gilbane* court determined that there was no federal policy favoring one forum over the other (the same situation which exists in the present case), that the state court action was slightly senior to the federal action, but that no significant action had taken place (the same situation which exists in the present case), and that there was some asserted possibility of piecemeal litigation (the same situation which exists in the present case). On these facts, the *Gilbane* court held that the party seeking the stay had not demonstrated exceptional circumstances, and in accordance with *Colorado River* principles, the stay was denied (the same situation which exists in the present case).

Thus, any "conflict among the Courts of Appeals" is purely illusory, since the only differences among the cases arise from the particular facts. The clear principles announced by this Court are applied by all Circuits, and there is no "special and important" reason for granting the writ.

Neither does there exist any lack of clarity in the law concerning who bears the burden of demonstrating the existence of exceptional circumstances. As early as *Landis* v. *North America,* 299 U. S. 248 (1936), this Court made it clear that a party seeking to deny another its forum has the burden of showing good cause for the denial. Subsequent cases, most notably *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation,* 460 U. S. 1 (1983), have left no doubt whatsoever that the party seeking stay or dismissal bears a heavy burden of demonstrating exceptional circumstances warranting rejection of jurisdiction. There exists no conflict among the Circuits regarding this principle. It was this principle which the District Court in the present case failed to apply, and which required reversal of the stay order. Again, Petitioner failed to demonstrate any "special and important" reason for review of this decision.

II. The Court of Appeals Correctly Determined That Exceptional Circumstances Did Not Exist to Justify Refusal to Exercise Jurisdiction.

The sole issue as to which Petitioner seeks review is whether the federal court case filed by R&S and the state court case filed by Lake Coal may proceed concurrently. This Court has clearly recognized that concurrent proceedings are the rule, and the abatement of federal proceedings in deference to state proceedings

is an exception which is permitted only upon the "clearest of justifications." *Colorado River, supra.* As this Court recently observed:

> [W]e emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist "exceptional" circumstances, the "clearest of justifications," that can suffice under Colorado River to justify the *surrender* of that jurisdiction.

Moses H. Cone Memorial Hospital, supra.

In this case, however, the District Court improperly placed on R&S, the non-movant, the burden of demonstrating some substantial reason for the exercise of jurisdiction by the district court. In its order granting a stay, the district court stated:

> The court . . . is of the opinion that *no good cause has been shown* to justify litigating the same issues simultaneously in two different judicial systems.

District Court Order, July 14, 1983 [Appendix 2] (emphasis supplied). As the Court of Appeals observed, requiring that R&S show good cause for concurrent jurisdiction was error requiring reversal.

Indeed, it is interesting to note that the district court order found to be in error in ***Moses H. Cone*** simliarly failed to properly allocate the burden. In that case, as in this one, the district court believed its stay order to be justified by the mere fact that a state

court action "involved the identical issue." ***In re Mercury Construction,*** 656 F. 2d 933 (4th Cir. 1981).

The Court of Appeals held that the district court had erred in failing to require the moving party (Lake Coal) to demonstrate exceptional circumstances justifying surrender of federal jurisdiction. This is clearly in accord with this Court's announcements on this issue.

Since the circumstances of the case were not in dispute, the Court of Appeals went on to apply the standards set forth in *Colorado River, supra,* and ***Moses H. Cone, supra,*** and held that no exceptional circumstances existed to justify surrender of jurisdiction. In reaching this determination, the Court of Appeals merely applied to the particular circumstances of this case the principles which this Court's opinions have required to be applied.

As the Court of Appeals noted, the state court action is not *in rem,* there was no significant difference in the relative progress of the state and federal actions, there is no significant difference in convenience of the federal versus the state forum, and both federal and state courts are capable of adjudicating the matters and applying the settled and uncomplicated law. Finally, as the Court of Appeals observed, Lake Coal has not demonstrated that it has any valid claim against the subcontractors, which is the only basis for their suggestion of the possibility of piecemeal litigation. Furthermore, even if this failure of proof did not exist, there is no reason to believe that the stay of the federal court action would serve to avoid piecemeal litigation,

since R&S (which clearly *is* in contractual privity with the subcontractors) could nonetheless file a separate action against the subcontractors.

In short, the record reflects no basis whatsoever for the district court's refusal to exercise jurisdiction, and certainly nothing even approaching the "exceptional circumstances" necessary for surrender of jurisdiction. Accordingly, the Court of Appeals properly reversed the stay order and remanded with directions to exercise jurisdiction. This result is clearly in accord with the principles enunciated by this Court, and there is no basis for review of the Court of Appeals' decision.

CONCLUSION

There are no special and important reasons to grant the petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit. The Court of Appeals applied the correct burden of persuasion and the correct standards for determining that no exceptional circumstances exist for surrender of district court jurisdiction.

Respectfully submitted,

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Counsel of Record for Respondent
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Of Counsel:

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition were mailed, first class postage prepaid to Ronald G. Polly and Gene Smallwood, Jr., P. O. Box 786, Whitesburg, Kentucky 41858 this ____ day of March, 1985.

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APPENDIX

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY - - *Plaintiff-Appellee*

v.

LAKE COAL COMPANY, INC. - - *Defendant-Appellee*

On Appeal from the United States District Court for the Eastern District of Kentucky

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OPINION—Filed November 20, 1974

Before: KEITH and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

CONTIE, Circuit Judge. Roberts & Schaefer Company (R&S appeals from a district court order staying proceedings in this diversity action pending the outcome of a concurrent state court action.[1] We reverse and remand with instructions for the district court to exercise jurisdiction.

In September 1981, the parties executed a written contract under which R&S would construct a coal washing plant for Lake Coal Company, Inc. (Lake) in Letcher County, Kentucky. R&S employed two subcontractors. On November 12, 1982, Lake filed a complaint in state court against R&S and the subcontractors alleging breach of

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[1]The district court's order is appealable. *See Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, ___ U. S. ___, 103 S. Ct. 927, 933-35 (1983).

contract, negligent design, construction and installation, breach of warranties and fraud. R&S asserted a counterclaim for the contract price.

Although the presence of the subcontractors as parties destroyed complete diversity, R&S attempted to remove the action on the ground that the subcontractors had been joined as defendants solely for the purpose of defeating federal diversity jurisdiction. The district court disagreed with R&S and remanded the action to the state court because federal jurisdiction was absent.

R&S then filed this action against Lake, essentially pleading the counterclaim that it had filed in state court. The subcontractors were not joined. Lake answered and filed its counterclaim for breach of contract, negligence, breach of warranties and fraud. Lake then moved to dismiss or to stay this action, which now involves the same issues as the state court action. The district court stayed this action pending the outcome of the state court proceedings because "no good cause has been shown to justify litigating the same issues simultaneously in two different judicial systems" (App. at 294) and because fairness to the parties and the avoidance of multiplicitous and piecemeal litigation counseled against exercising concurrent jurisdiction.

The general rule is that the prior pendency of a state court action does not bar concurrent federal proceedings on the same matter. *See Will* v. *Calvert Fire Insurance Co.,* 437 U. S. 655, 662 (1978); *Colorado River Water Conservation District* v. *United States,* 424 U. S. 800, 817 (1976). Indeed, federal courts have a "virtually unflaging obligation" to exercise their jurisdiction. *Moses H. Cone Hospital* v. *Mercury Construction Corp.,* __ U. S. __, 103 S. Ct. 927, 936 (1983); *Colorado River Water,* 424 U. S. at 817. Nevertheless, a district court may sometimes decline to exercise jurisdiction where a state court action on

the same issues is pending. The purpose of this limited exception to the duty to exercise jurisdiction is to conserve judicial resources and to promote comprehensive disposition of litigation. *See Colorado River Water,* 424 U. S. at 817. The exception is even narrower than the abstention doctrine. *Id.,* at 818.

In deciding whether or not to exercise jurisdiction in this type of case, a district court must determine whether there exist "exceptional circumstances" that justify not doing so. *See Moses H. Cone Hospital,* 103 S. Ct. at 942. Since "only the clearest or justifications," *Id.; Colorado River Water,* 424 U. S. at 819, will warrant a stay, the burden of persuasion is upon the party seeking the stay. Moreover, the parties agree that a district court must evaluate several factors, no one of which is determinative, in reaching its decision: (1) whether the state action is an action *in rem,* (2) whether the federal and state actions have progressed to the same stage,[2] (3) whether the federal forum is convenient, (4) whether the state proceedings are adequate, (5) whether the subtanstive claims involve federal or state law and (6) whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed.

We hold that the district court erred in assigning the burden of persuasion. Although the burden was upon Lake to show "exceptional circumstances" amounting to the "clearest of justifications" for not exercising federal jurisdiction, the district court's order indicates that the court required R&S to show good cause why concurrent jurisdiction should be exercised. This error alone is sufficient to warrant reversal.

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[2]The progress of the federal and state actions is more relevant than the times of filing of the respective complaints. *See Moses H. Cone Hospital,* 103 S. Ct. at 940.

Furthermore, we hold that "exceptional circumstances" do not exist in this case. First, the state court action is not an action *in rem*. Second, the federal and state actions have progressed to about the same stage of discovery. Third, the federal court is only about fifty-three miles from the construction site. Fourth, both the federal and state courts appear capable of adjudicating the parties' claims and affording appropriate relief. Thus, none of the first four factors enumerated above augurs in favor of staying the federal action pending the outcome of the state proceedings.

Fifth, although both the federal and state actions involve solely questions of state law, Lake has not demonstrated either that the state law issues are so difficult or that state law is so unsettled that state court expertise is required. Accordingly, the fifth factor listed above does not constitute an exceptional circumstance justifying a refusal to exercise federal jurisdiction.

The final factor is whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed. Lake contends that piecemeal litigation will result if the federal action is not stayed because the subcontractors, whom Lake sued in state court, are not parties to the federal action. Having reviewed the arguments and the record submitted by the parties, we hold that Lake has not shown either that piecemeal litigation likely will occur if the federal action is not stayed or likely will be avoided if the federal action is stayed.

As to the former point it is noteworthy that the subcontractors are not parties to the September 1981 contract. Moveover, Lake has not shown that it has an arguably valid claim under Kentucky law against the non-signatory subcontractors. In short, Lake has not shown that the absence of the subcontractors in the federal action will result in Lake filing a separate action against them. Moreover,

piecemeal litigation could occur in the state courts in the form of a separate action by R&S against the subcontractors if R&S is held liable to Lake for damages. Hence, piecemeal litigation may not be avoidable even if the federal action is stayed.

The judgment of the district court is REVERSED and the case is REMANDED with instructions to exercise jurisdiction.

APPENDIX II

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff,*

v.

LAKE COAL COMPANY, INC., - - - - *Defendant.*

ORDER—Filed July 15, 1983

The defendant has moved the Court to dismiss or stay this action pending resolution of an action involving the same issues and the same parties, et al., in Letcher Circuit Court (Civil Action No. 82-CI-414). The Court has considered the parties' responses and replies to responses to defendant's motion herein and is of the opinion that no good cause has been shown to justify litigating these same issues simultaneously in two different judicial systems. The Court being so advised,

IT IS HEREBY ORDERED, that in the interests of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court.

This the 14th day of July, 1983.

(s) G. Wix Unthank
G. Wix Unthank, Judge

No. 84-1240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC., - - Petitioner,

versus

ROBERTS & SCHAEFER COMPANY, - Respondent.

On Writ of Certiorari to the Court of Appeals for the Sixth Circuit

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JOINT APPENDIX

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Petition For Certiorari Filed January 30, 1985
Certiorari Granted March 25, 1985

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DOCKET ENTRIES

Date	No.	Proceedings U. S. District Court For The Eastern District of Kentucky
1983		
04/06	1	COMPLAINT — Summons & 2 copies issued with 2 copies each from 18A & Notice to atty. and delivered to attorney for plaintiff by Lexington office, with magistrate order & stip. attached, with Exhibits 1 & 2 attached.
04/29	5	ANSWER AND COUNTERCLAIM of defendant, Lake Coal Co., Inc.
	6	MOTION, of defendant, to dismiss or STAY and NOTICE that same will be heard at conven. of court with Exhibits A, B, C attached.
	7	MEMORANDUM, of defendant in support motion to dismiss, or STAY.
05/06	8	REPLY, of plaintiff to counterclaim of defendant.
	9	RESPONSE, of plaintiff to defendant's motion to dismiss or stay.
05/16	12	REPLY MEMORANDUM, of defendant.
05/19	13	RESPONSE, of plantiff to defendant's reply memorandum.
05/24	14	REPLY, of defendant to plaintiff's response.
05/25	15	SUPPLEMENTAL MEMORANDUM, of plaintiff.

Date	No.	Proceedings U. S. District Court For The Eastern District of Kentucky
1983		
07/15	17	ORDER: (GWU) sig. 7/14/83; that in interests of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal litigation, Action now STAYED pend. final adjudication of aforementioned state action in Letcher Circuit Court. Copies as noted.
07/25	18	NOTICE OF APPEAL, of plaintiff. Attest Copy of Notice of Appeal, Form 411, 6CA-53, Rule 18, 6CA-32, 6CA-30 with update docket sheet to all counsel; CERTIFIED RECORD on appeal w/orig. & 1 copy 6CA-33 and update docket sheet to U. S. 6CCA w/copy 6CA-33 to all counsel. (INTERLOCUTORY APPEAL)

DOCKET ENTRIES

Date	No.	Proceedings U. S. Court of Appeals For The Sixth Circuit
1983		
08/05	1	Copy of notice of appeal, filed; and caused docketed
08/09		*Certified Record* (02 vol. pleadings) filed
09/09	8	Motion: appellant for a summary reversal of the district court's order staying the district court's proceedings pending final adjudication of the state action or in the alternative to expedite the proceedings on appeal (m-9/08) (See entry #18)

Date	No.	Proceedings U. S. Court of Appeals For The Sixth Circuit
09/09	9	Brief (10) of the appellant (m-9/08) & Filed 9/09
09/09	10	Certificate of service for both the brief and appendix submitted by the appellant
09/19	12	Response: appellee, in opposition, to appellant's motion for summary reversal or for advancement (m-9/16) (See entry #18)
11/03	18	Order denying appellant's motion to transmit a state court record and to summarily reverse the district court's order but granting the motion to advance this cause (Jones, Krupansky and Wellford, JJ.) (MOTIONS PANEL)
12/02	19	Brief (10) of the appellee (m-11/30)
12/06		Appendix (5) (m-12/07)
12/07	20	Certificate of service for the appendix
12/19		Reply Brief (10) of the appellant (m-12/15)
1984		
10/26	24	Cause argued by C. Kilmer Combs for appellant, Ronald Polly for appellee and case submittted to the Court (Before: Keith, Contie and Peck, JJ.)
11/20	25	Judgment of the District Court reversed and the case remanded with instructions to exercise jurisdiction (Keith, Contie and Peck, JJ.) (NFP)

Docket Entries

Date	No.	Proceedings U. S. Coutt of Appeals For The Sixth Circuit
1984		
12/03	26	Petition for Rehearing (m-12/01)
12/21	27	Order denying petition for rehearing (Keith, Contie and Peck, JJ.)
12/27	28	Motion: appellee to stay mandate pending application for writ of certiorari (m-12/26)
1985		
1/03	29	RESPONSE: appellant in opposition to stay mandate (m-1/2)
1/04	30	ORDER: granting stay of mandate until 2/4/85 (Contie, J.)
1/10	31	MOTION: appellant to reconsider stay of mandate w/memorandum in support (m-1/9)
1/16	32	ORDER: appellant to reconsider stay of mandate is denied (Contie, J.)
2/08	33	SUPREME COURT NOTICE: petition for writ of cert. filed 1/30/85 (Sup. Ct. No. 84-1240)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

Roberts & Schaefer Company, - - - *Plaintiff,*

v.

Lake Coal Company, Inc., - - - - *Defendant.*

COMPLAINT—Filed April 6, 1983

Serve: C. T. Corporations System
Kentucky Home Life Building
Louisville, Kentucky 40202

1. The Plaintiff is a corporation organized under the laws of the state of Delaware with its principal place of business in Chicago, Illinois. At no time has the Plaintiff been incorporated in or had any place of business in the Commonwealth of Kentucky. It has never been a citizen of Kentucky.

2. The Defendant is a corporation organized under the laws of the Commonwealth of Kentucky with its principal place of business in Roxana, Letcher County, Kentucky. At no time has the Defendant been incorporated in or had any place of business in either the state of Delaware or the state of Illinois. It has never been a citizen of any state other than Kentucky.

3. Jurisdiction of this action is based upon diversity of citizenship, 28 U.S.C. § 1332, and the amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

COUNT I

4. On September 14, 1981, the Plaintiff and Defendant entered into a contract for the construction of a coal preparation facility at Roxana, Letcher County, Kentucky. The contract was executed by the Plaintiff on August 26, 6, 1981, and by the Defendant on September 14, 1981. A copy of the contract is attached hereto as Plaintiff's Exhibit 1 and adopted by reference.

5. The Plaintiff promptly entered into the performance of the contract, constructed the coal preparation facility, and fulfilled all of its obligations and commitments under the contract. There is due Plaintiff, under the contract, the sum of $1,097,615.96, with interest.

6. Paragraph 11 of the contract entitled "FOUNDATIONS" provided that the Defendant would have soil core borings taken and analyzed by registered soil engineers and provide the Plaintiff with proper analyses and recommendations. Defendant furnished improper analyses and recommendations. As a result, it became necessary to use additional labor, materials, equipment and supplies in the performance of the contract, all of which was done at the special instance and request of the Defendant. The reasonable cost of such additional work, materials, equipment and supplies furnished by the Plaintiff is $300,000.00, with interest, which it is entitled to recover from the Defendant in addition to the contract price.

7. The Defendant has paid to the Plaintiff the sum of $3,414,111.00 on the contract price, leaving a balance of $1,097,615.96. Plaintiff is entitled to recover the balance of the contract price of $1,097,615.96 and in addition thereto $300,000.00 as the reasonable cost of labor, materials, equipment and supplies caused to be furnished by the Plaintiff as a result of the Defendant's failure to provide proper

soil analyses and recommendations, making a total of $1,397,615.96, with appropriate interest.

COUNT II

8. The Plaintiff adopts the allegations contained in paragraphs 1 through 7.

9. The last date on which the Plaintiff performed labor or furnished materials and supplied for the construction of the coal preparation facility pursuant to the contract between Plaintiff and the Defendant was February 1, 1983.

10. The total amount due Plaintiff with all just setoffs and credits known to it is $1,397,615.96, with interest. To secure the payment of this amount, the Plaintiff has and asserts a lien pursuant to KRS 376.010, et. seq. against all of the Defendant's right, title and interest in and to the real property owned by the Defendant upon which the labor, materials, equipment and supplies were furnished in the performance of the contract.

11. On February 16, 1983, Plaintiff caused a statement of mechanic's and materialman's lien to be filed, which is recorded at Encumbrance Book 16, page 357 in the Letcher County Court Clerk's Office. A certified copy of the lien statement is attached hereto as Plaintiff's Exhibit 2 and Plaintiff asserts a lien on Defendant's property therein described to secure the indebtedness.

12. The property cannot be divided without materially impairing its value and the Plaintiff's interest therein. No other person or entity owns any interest therein. The property should be sold as a whole to satisfy the Defendant's indebtedness to the Plaintiff.

WHEREFORE, the Plaintiff demands Judgment as follows:

Complaint—Filed April 6, 1983

1. Judgment against the Defendant Lake Coal Company, Inc. in the amount of $1,397,715.96 with appropriate interest.

2. A lien in Plaintiff's favor on the lands of Defendant described in Plaintiff's Exhibit 2 to secure payment of such indebtedness.

3. The property be sold to satisfy the indebtedness.

4. Plaintiff's costs.

(s) C. Kilmer Combs
C. Kilmer Combs
Wyatt, Tarrant & Combs
1100 Kincaid Towers
Lexington, Kentucky 40507
(606) 233-2012

(s) K. Gregory Haynes (CKC)
K. Gregory Haynes
Wyatt, Tarrant & Combs
2600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

PLAINTIFF'S EXHIBIT 1

CONTRACT AGREEMENT

1. PROPOSAL: We (the "Contractor"), propose to furnish you (the "Owner"), at the price hereinafter stated, Coal Preparation Facility (the "Work").

This facility will be generally as shown on the Contractor's drawings and be, as generally, described in the Contractor's "Specifications". Drawings 8115-FS1, 8115-L1 through including 8115-14, all dated June 17, 1981.

This Proposal, together with the drawings and specifications, when duly accepted and approved as herein provided, is hereinafter called the "Agreement".

2. SITE PREPARATION: It is understood and agreed that you will furnish us the construction site free of any buildings or other obstructions and graded down to an even surface, ready for foundation excavation, to the elevations required by the final working drawings.

3. FURNISHING ENGINEERING DATA: It is agreed that you will furnish us all engineering data relative to the construction site such as land surveys, topographical maps, with details, dimensions and location of your related installations or machinery, which might influence our design or construction. It is further agreed that you will furnish, at the construction site, the coordinates and bench-mark elevations at a point to be agreed upon later and that any additional expense incurred by us, or by you, as a result of inaccuracy of data furnished by you will be borne by you.

4. FURNISHED BY OWNER: It is agreed that you will furnish without cost to us, the items listed under Specification item entitled "Duties by Owner".

5. FURNISHED BY CONTRACTORS: It is agreed that we will furnish all other materials, construction equipment, tools and labor necessary for the proper execution and completion of the Work covered by this Proposal.

6. Damages and Liens: We agree to hold and save you harmless from any loss arising from personal injury to property damage, caused solely by our negligence, and arising out of the work being performed by us; also to hold and save you harmless against all claims for wages to be paid and materials supplied by us entering into the construction of the facility, whether such claims are in the forms of mechanics liens or otherwise.

At the Owner's option and written demand, no partial or final payment hereunder shall be due until all waivers or partial waivers, as the case may be, of liens of all persons furnishing labor or material in connection with the Work shall be presented to the Owner.

7. Insurance: We will furnish and maintain such insurance as will protect us from claims under Workmen's Compensation Acts and from claims for damage because of bodily injury including death and because of property damage, which may arise from our performance of work covered by this Proposal.

We will also effect and maintain Builders All-Risk Insurance coverage upon the entirety of the Work encompassed within this proposal to one hundred percent (100%) of the insurable value thereof.

You will assume all risk on any materials furnished by you, and you will assume all risk on the facility on the date of your beneficial use or occupancy of the facility.

We will further provide and maintain Comprehensive General Liability and Comprehensive Automobile Liability Insurance in no less than the following amounts:

Bodily injury each person	$ 500,000.00
Bodily injury each occurrence	$1,000,000.00
Property damage	$ 100,000.00

You will be furnished certificates of insurance evidencing that said insurance is in effect and that you are a named insured therein. The policies will provide that the insurers will give you at least ten (10) days prior notice in the event of any alteration or cancellation of such insurance.

8. Patents and Claims: We will pay all royalties and process license fees and will defend all suits or claims for infringement of any patent rights and will save you harmless from loss on account thereof, except that you will be responsible for all such loss when a particular design, process, or the product of a particular manufacturer or manufacturers is specified or furnished by you for inclusion in the Facility.

9. Testing Period. It is agreed that after we have completed erection of the facility according to our plans and specifications, we will assist your personnel to place the same operation and instruct them in its proper operation. Upon our written notice of completion you will then have the next twenty (20) days during which the facility is in operation in which to test the facility, and to give our duly authorized representative a written "punch list" itemizing any objections. When all such punch list items have been corrected or satisfied, you will then have an additional twenty (20) operating days in which to signify acceptance or submit, in writing, further punch list items. These cycles of Owner punch list items and Contractor corrections shall continue until the facility is acceptable. Failure to submit punch list items within twenty (20) operating days or within any ten-day cycle thereafter following our notification of completion shall constitute an acceptance of the facility and all retained moneys shall then become due and payable; provided, however, that this paragraph shall not affect or restrict in any way your rights to all guarantees under this Agreement.

10. TITLE OF FACILITY: For security purposes only, the title and ownership of the property called for and furnished under the terms of this Contract shall remain with us until the full and final payment therefore in cash shall have been made according to the terms agreed upon, and notes, if any, shall have matured and been paid in full in cash. In case of default in any of the payments above provided for, we may repossess ourselves of the within mentioned property, and all additions thereto wherever found, and shall not be liable in any action of law, nor for the repayment of any money or moneys which may have been paid by you in part payment for said installation and equipment, and if said machinery or structure is placed upon mortgaged or encumbered premises, it shall be without prejudice to our rights thereto as herein provided. It is further agreed that no machinery to structure furnished under the Contract shall become a fixture by reason of being attached to real estate and any part thereof may be separated from the real estate and may be repossessed by us or our agent upon default in payment of the purchase money without any liability on the part of our company for such removal.

11. FOUNDATIONS: It is understood that this Proposal is based on dry earth (without rock) excavation and level ground and/or topography shown on our drawings, the absence of hydrostatic head or ground water, and that foundations are to be to the depth and extent shown on our plans and assumes soil bearing values as indicated in item entitled "Structures" of the preceding Specifications.

Upon the acceptance of the Proposal, the Owner shall have soil core borings taken at the locations of new structures and the borings analyzed by a registered soils engineer. Based upon the engineer's analysis and recommendations, the Contractor shall re-estimate foundation requirements and adjust the contract price accordingly.

Any foundations that should be required beyond those shown on our plans of this Proposal.

After we have proceeded with the design, should you require changes in the design of the foundations to meet your requirements, we will redesign according to your data, subject to your approval, on an actual cost basis as set forth in the Force Account Section of this Proposal.

12. CONTRACT PRICE: Price applicable to the Work encompassed by this Proposal is $4,228,000.

It is understood and agreed that the above quoted price is subject to increase by the amount of any Sales, Use or Occupational Tax, Manufacturer's Tax, Personal Property Tax or Excise Tax, levied or charged to us, or charged retroactively to us by Federal, State, Municipal or any other Governmental Agency applicable to the Work covered by this Proposal and not specifically provided for elsewhere herein.

Should this Proposal not be accepted within thirty (30) days from date hereof, it may be void at our option.

13. TIME OF COMPLETION: We agree to complete the Work under this proposal in accordance with the Bar Schedule appearing on Page 109 of this proposal.

14. TERMS OF PAYMENT: Terms of payment to be as follows: We will submit at the end of each month an invoice covering engineering or field work done and materials shipped, or in transit, or in process under progress payment billing during that month. Payment of ninety-five (95%) percent of this amount is to be made by you on or before the tenth day after date of such invoice. The remaining five (5%) percent is to be retained by you until the facility is completed and accepted as provided for in

this Agreement after which the retained funds become due and payable forthwith.

15. Payments on Delayed Shipments: If shipments of materials cannot be delivered or materials received because of delays caused by you, then you are to pay us the purchase price of such materials when ready for shipment.

16. Cancellation or Suspension: It is expressly agreed that should you, for any reason, after this Proposal has been accepted, desire to cancel the same or to suspend operations during the engineering or construction periods, for a period of in excess of a total of fifteen (15) days you may do so, but in that event, you are to pay us within thirty (30) days from the date of your order of cancellation or commencement of suspension, all costs and expenses attributable to the following:

A. Those incurred by reason of the cancellation or suspension;
B. Those incurred in carrying out the work, including office and traveling expenses;
C. Those incurred for material ordered or furnished;
D. Those incurred for all labor furnished;
E. Any additional costs or expenses incurred by us;

In addition to the above, you are to pay us fifteen percent (15%) of the total amount of all such items. Nonpayment of any billing for forty-five (45) days shall, at our option, constitute cancellation.

17. Bond: It is agreed that should you require us to furnish any bond on this work, you are to pay the premium for the same, in addition to the price of the Work hereinabove stated.

18. Delays and Extensions—Force Majeure: Any delays in or failure of performance by Contractor under

this agreement will not constitute default or give rise to any claims for damages or penalties if the delay or failure is caused by occurrences beyond the control of the Contractor. Such occurrences would include, but not be limited to, acts of God, acts of governmental authorities, strikes, labor problems, riots, rebellion, war, sabotage, fire, floods, explosions, inability to procure after diligent efforts, materials or labor contemplated for this agreement, and obstruction or delay of construction caused by Owner or its agents, and/or by any change or extra work order required by Owner. In the event of any such delay, the date of completion shall be extended for a period equal to the time lost by reason of delay.

19. Calculations of Capacities: It is understood and agreed that all calculations of capacities and rates referred to in the preceding Specifications are based on a short ton of two thousand pounds.

20. Future Improvements in Design: It is understood and agreed that although there may be future changes in the design of, or additions to, or improvements upon our standard products as are now contained in the Specifications, the models of such products as of the date hereof are to be installed in the facility. We will be under no obligation to modify the facility according to such future changes, additions or improvements.

21. Guarantee: We hereby warrant you that all material and equipment installed under this Proposal will be new unless otherwise specified, and that all work will be of good quality, free from faults and defects, and in conformance within one year from the date of initial operation of such machinery, we will supply to you, F.O.B. factory, free of charge, parts to replace such defective parts, provided such defects are not caused by the misuse or neglect

of the equipment. In consideration of furnishing such machinery parts, it is agreed that we are thereby relieved of any expense or damage due to such defects.

The express warranties and remedies set forth in this Proposal are exclusive and no other warranties or remedies of any kind, whether statutory, oral, written, express or implied, including any implied warranty of merchantability of fitness for a particular purpose shall apply. Owner's exclusive remedies and the Contractor's only obligations arising out of or in connection with defective equipment or workmanship, whether based on warranty, contract, tort, or otherwise shall be those stated herein. The Contractor shall in no event be liable for special or consequential damages.

22. Equipment and Materials: The manufacturer or brand of the equipment specified is intended only to be indicative of the quality proposed, and the Contractor reserves the right to furnish equipment of like quality if in his opinion it improves operation, delivery, or overall quality of the facility.

In preparing details of the facility covered by this Proposal, it is understood and agreed, that if found necessary by the Contractor, equivalent sections or material may be substituted to facilitate delivery, fabrication or design.

23. Changes in Design and Extra Work: The Contractor's responsibility and duties are limited to constructing a physical system or facility in accordance with the written terms of this Proposal and the Contractor's drawings and specifications.

Should you require any changes in the design of the facility as covered by this Proposal, to meet your requirements or otherwise, or any extra work not covered by this Proposal, it is distinctly understood that you are to pay for all extra engineering, labor and materials not called for by

our plans and specifications (including erection equipment rental) at actual cost as set forth in the Force Account Section of this Proposal.

No extra or force account work will be undertaken by the Contractor unless it is requested in writing by the Owner.

24. Remarks: It is understood and agreed that any treatment of process water required to adjust the pH value of said water is outside the scope of this Proposal. We assume no obligation to replace materials or equipment damaged by corrosive water after initial beneficial use by Owner. During the testing period, Contractor will advise Owner of recommended PH value and suggest means to obtain such value.

The Contractor's responsibility for environmental pollution is limited to that stipulated in the Proposal.

The Contractor will supply only such safety devices as are specified in this Proposal. Any additional safety measures or devices which may be required by law, or which you may wish to add, are to be furnished by you, or at your written request, they will be furnished on an actual cost basis as set forth in the Force Account Section of this Proposal.

It is expressly agreed that there are no promises, agreements or understandings outside of this Proposal.

25. Acceptance: This Proposal is subject to the written approval of an Executive Officer of the Company in Chicago, Illinois, and shall not be binding upon the Company until so approved.

Contract Agreement

Respectfully submitted,

Roberts & Schaefer Company
(s) Warren C. Gerler
Warren C. Gerler
Contracting Engineer

Accepted:

(s) John J. Innes
President, Lake Coal Co., Inc.

Date: September 14, 1981

Approved:

Roberts & Schaefer Company

(s) M. E. Prunty, Jr.
Executive Vice President

Date: Aug. 26, 1981

PLAINTIFF'S EXHIBIT 2

MECHANICS' AND MATERIALMEN'S LIEN

STATE OF KENTUCKY
COUNTY OF LETCHER

KNOW ALL MEN BY THESE PRESENTS:

The undersigned affiant, John T. Aubrey, counsel for ROBERTS & SCHAEFER COMPANY, a corporation, states that pursuant to the provisions of KRS. 376.010 et seq a lien is claimed against, in and upon the property referenced below of LAKE COAL CO., INC. of Roxana, Letcher County, Kentucky, in the sum of $1,397,615.96, with all known credits and set-offs having heretofore been deducted and no known other credits or set-offs now to such amount, on the following real property and appurtenances, located in Letcher County, Kentucky:

TRACT I

That same property conveyed to Lake Coal Co., Inc. by Jimmie Hogg and Doris Hogg by deed of conveyance dated November 9, 1981, and of record at Deed Book 259, page 418, records of the Letcher County Clerk's Office.

TRACT II

That same property conveyed to Lake Coal Company, Inc. by the Commonwealth of Kentucky by George L. Atkins, Secretary of the Department of Finance, by quitclaim conveyance dated April 6, 1981,and of record at Deed Book 257, page 179, records of the Letcher County Clerk's Office.

TRACT III

That same property conveyed to Lake Coal Co., Inc. by Jimmie Hogg and Doris Hogg by deed of conveyance

dated March 1, 1979, and of record at Deed Book 243, page 33, records of the Letcher County Clerk's Office.

TRACT IV

That same property conveyed to Lake Coal Co., Inc., by Jimmie Hogg and Doris Hogg by deed of conveyance dated March 1, 1979, and of record at Deed Book 243, page 29, records of the Letcher County Clerk's Office.

TRACT V

That same property conveyed to Lake Coal Co., Inc. by Billy Ray Banks and Carolyn Banks by deed of conveyance dated April 7, 1978, and of record at Deed Book 233, page 348, records of the Letcher County Clerk's Office.

TRACT VI

That same property conveyed to Lake Coal Co., Inc. by Shirley Ann Hogg Gentry by deed of conveyance dated March 7, 1978, and of record at Deed Book 233, page 91, records of the Letcher County Clerk's Office.

TRACT VII

That same property conveyed to Lake Coal Co., Inc. by Jimmie Hogg and Doris Hogg by deed of conveyance dated March 2, 1978, and of record at Deed Book 233, page 94, records of the Letcher County Clerk's Office, excepting that portion heretofore conveyed by Lake Coal Co., Inc. to Jimmie Hogg by deed of conveyance dated March 1, 1979, of record in Deed Book 243, page 37, Letcher County Clerk's Office.

That the work performed by Roberts & Schaefer Company was pursuant to contract between it and Lake Coal

Co., Inc. accepted by Lake Coal Co., Inc. on September 14, 1981 and pursuant to said contract Roberts & Schaefer Company performed labor, services and furnished supplies and materials for a facility commonly known as a coal preparation plant. The last work performed, services rendered or supplies and materials furnished was February 1, 1983.

Roberts & Schaefer Company hereby asserts a lien upon all the right, title and interest of Lake Coal Co., Inc., in the improvements on the said real estate and the above described real estate and the said Roberts & Schaefer Company claims a mechanics' and materialman's lien on said property for said amount.

This the 15th day of February, 1983.

(s) John T. Aubrey
John T. Aubrey, Counsel for Roberts & Schaefer Company, and Affiant

This instrument was prepared by:

(s) John T. Aubrey
Lyttle & Aubrey
Attorneys at Law
P. O. Box 451
Manchester, Kentucky 40962

STATE OF KENTUCKY
COUNTY OF CLAY

Subscribed and sworn to before me by John T. Aubrey, and personally known to me, this 15th day of February, 1983.

(s) Glenda Sester
Notary Public, Ky. State at Large

My commission expires:

April 14, 1986

STATE OF KENTUCKY
COUNTY OF LETCHER

I, Charlie Wright, of Letcher County Court do hereby certify that the foregoing Mechanics' and Materialmen's Lien was on the 16th day of February, 1983, lodged in my office for record and that it and this certificate, have been duly recorded in Enc. Bk. 16, page 351.

Witness my hand this 24th day of February, 1983.

Charlie Wright, Clerk
(s) By: Peggy J. Short, D.C.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff,*

v.

LAKE COAL COMPANY, INC., - - - - *Defendant.*

MOTION TO DISMISS OR STAY AND NOTICE

Filed April 29, 1983

Comes the defendant and moves the court to dismiss the complaint filed herein or stay this proceeding pending adjudication of Civil Action No. 82-CI-414, Lake Coal Co., Inc., a Kentucky corporation, versus Roberts and Schaefer Company, A Delaware corporation, Elgin National Industries, Inc., a Delaware corporation, Darby Construction Company, a Kentucky corporation, and Langley & Morgan Corporation, a Kentucky corporation, in the Letcher Circuit Court, Whitesburg, Kentucky, and for grounds states as follows:

1. That on November 12, 1982, the defendant herein filed its complaint in the Letcher Circuit Court against the plaintiff herein, Roberts & Schaefer Company, and other defendants, Elgin National Industry, Inc., Darby Construction Company, and Langley & Morgan Corporation, regarding, inter alia, a contract entered into by and between the defendant and plaintiff herein dated September 14, 1981, whereby the plaintiff was to furnish the defendant a coal preparation facility, including washer plant, static thickener, refuse bin, and connections thereto, and provide the

design, engineering, construction, installation and performance thereof on a "turn-key basis" at the defendant's land site at Roxana, Letcher County, Kentucky.

2. That on December 1, 1982, Roberts & Schaefer Company, the plaintiff herein, and Elgin National Industries, Inc., filed a petition for removal, bond and notice with the U. S. District Court for the Eastern District of Kentucky, and the action was docketed in the U. S. District Court, Civil Action No. 82-434.

3. That on December 3, 1982, Roberts & Schaefer Company, the plaintiff herein, filed its separate answer and counterclaim in Civil Action No. 82-434, a copy of which is attached hereto and made a part hereof and marked as Defendant's Exhibit A; that Lake Coal Company, Inc., the defendant herein, filed a reply to said counterclaim on December 23, 1982, a copy of which is attached hereto and made a part hereof and marked as Defendant's Exhibit B.

4. That on February 15, 1983, the U. S. District Court for the Eastern District of Kentucky entered an order finding that the District Court lacked original jurisdiction, pursuant to 28 U. S. Code §1332 (a)(1) and (c), remanded Civil Action No. 82-434 to the Letcher Circuit Court, pursuant to 28 U. S. Code §1447, and struck same from its active docket; that a copy of said order is attached hereto and made a part hereof and marked as Defendant's Exhibit C; that the action on remand, Civil Action No. 82-414, is currently pending in the Letcher Circuit Court.

5. That on April 6, 1983, the plaintiff herein filed its complaint in this action; that the plaintiff's complaint involves the same parties, demands the same or substantially the same remedies, and restates the same question previously presented in its counterclaim in Civil Action No. 82-CI-414, now pending in the Letcher Circuit Court;

that the plaintiff's complaint is no more than a renewed effort to remove the original action to federal court after this Court remanded the action to the state court for lack of jurisdiction.

6. That Roberts & Schaefer Company's cause of action was originally plead in its counterclaim in the Letcher Circuit Court and as such that court holds jurisdiction to the exclusion of the District Court until the original action is fully litigated and the state court's jurisdiction exhausted so as to avoid interference with the orderly and comprehensive disposition of the action by the state court.

7. That the plaintiff's complaint raises no federal questions which require the particular competence of the U. S. District Court.

8. That the plaintiff herein is not adversely affected by litigating its cause of action as stated in its counterclaim in the Letcher Circuit Court.

9. That the Letcher Circuit Court is in a position to promptly determine the entire controversy and to settle the rights of all parties, including those not named by the plaintiff in its complaint herein.

10. That as further grounds the defendant files herewith its memorandum.

WHEREFORE, the defendant moves the court to dismiss the complaint herein or to stay this action pending final adjudication of Civil Action No. 82-CI-414 in the Letcher Circuit Court.

Respectfully submitted,

Polly, Craft, Asher & Smallwood
(s) Ronald G. Polly
Ronald G. Polly
Gene Smallwood, Jr.
P.O. Box 786
Whitesburg, Kentucky 41858
606-633-4469

Cook & Wright
(s) Forrest E. Cook
Forrest E. Cook
P.O. Box 909
Whitesburg, Kentucky 41858
606-633-4469

N O T I C E

The parties hereto and their attorneys are hereby notified that the undersigned will bring the foregoing Motion on for hearing before the Honorable G. Wix Unthank, Judge of the U. S. District Court, Eastern District of Kentucky, Pikeville Division, at such date, time and place as the Court shall order.

Polly, Craft, Asher & Smallwood
(s) Ronald G. Polly
Ronald G. Polly
Gene Smallwood, Jr.
P.O. Box 786
Whitesburg, Kentucky 41858
606/633/4469

(Certificate of Service omitted in printing.)

DEFENDANT'S EXHIBIT A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 82-434

LAKE COAL CO., INC., - - - - - *Plaintiff,*

v.

ROBERTS & SCHAEFER COMPANY, Et. Al., - *Defendants.*

SEPARATE ANSWER AND COUNTERCLAIM OF ROBERTS & SCHAEFER COMPANY

Filed December 3, 1982

FIRST DEFENSE

1. The Complaint, and each Count thereof, fail to state a claim against this answering defendant upon which relief may be granted.

SECOND DEFENSE

2. This answering defendant admits that plaintiff is a corporation organized and existing under the laws of the state of Kentucky with its office and principal place of business at P. O. Box 129, Roxana, Letcher County, Kentucky 41848. It further admits that the defendant Elgin National Industries, Inc. is a corporation organized and existing under the laws of the state of Delaware with an office, place of business and mailing address of 120 South Riverside Plaza, Chicago, Illinois 60606, and is the parent company of Roberts & Schaefer Company. This defendant admits

the allegations of paragraph (4) of Count I of the Complaint.

3. This answering defendant further admits that on September 14, 1981, the plaintiff and the defendant Roberts & Schaefer Company entered into a written contract for the construction of a coal preparation facility more particularly identified therein, the terms of which are set out in the original document executed by the defendant Roberts & Schaefer Company on August 26, 1981, and by the plaintiff Lake Coal Co., Inc. on September 14, 1981. This answering defendant further admits that the defendant Roberts & Schaefer Company entered upon the performance of such contract promptly after the execution thereof by the parties thereto. It further admits that the defendants Darby Construction Company and Langley & Morgan Corporation, as subcontractors of Roberts & Schaefer Company, performed certain portions of the contract in a workmanlike manner in conformity with the contract.

4. This answering defendant denies each and every allegation of Count I of the Complaint except those expressly admitted herein.

5. This answering defendant denies each and every allegation of Count II of the Complaint except those expressly admitted herein.

6. This answering defendant denies each and every allegation of Count III of the Complaint except those expressly admitted herein.

7. This answering defendant denies each and every allegation of Count IV of the Complaint except those expressly admitted herein.

8. All allegations of the Complaint not expressly admitted herein are denied.

THIRD DEFENSE

9. The damages claimed by the plaintiff in the Complaint were caused solely by the negligence and carelessness of the plaintiff in providing Roberts & Schaefer Company improper soil core borings analysis and recommendations in violation of the terms and provisions of the contract.

10. The plaintiff was guilty of contributory negligence which was the sole cause of the damages complained of in the Complaint, but for which they would not have occurred.

FOURTH DEFENSE

11. This answering defendant says that under the contract there is a warranty limited solely to replacement of parts and repair of the facility should any workmanship, material or equipment be defective, as set forth in paragraph 21. "GUARANTEE:". Under the contract all other claims for damages are waived and released.

FIFTH DEFENSE

12. The damages complained of in the Complaint were caused by independent and superseding causes brought about by negligence and breaches of contract by the Plaintiff prior to and during performance of the contract.

COUNTERCLAIM

13. Roberts & Schaefer Company adopts all of the allegations and admissions of the Answer.

14. Roberts & Schaefer Company promptly entered into the performance of the contract of September 14, 1981, between it and the plaintiff, constructed the coal prepara-

tion plant, and fulfilled all of its obligations and commitments under the contract.

15. The contract provided in paragraph 11. "FOUNDATIONS:" the plaintiff would have soil core borings taken and analyzed by a registered soils engineer and provide Roberts & Schaefer Company with a proper analysis and recommendations. The plaintiff failed to provide proper soil core borings, a proper engineering analysis and proper recommendations. As a result, it became necessary to furnish additional labor, materials and equipment and consume additional time in the performance of the contract, all of which was done at the special instance and request of the plaintiff. The reasonable cost of such additional work, materials and equipment supplied by Roberts & Schaefer Company is $300,000.00, which it is entitled to recover from the plaintiff.

16. The plaintiff has paid to Roberts & Schaefer Company the sum of $3,414,111.00 on the contract price, leaving a balance of $1,097,615.96. The defendant Roberts & Schaefer Company is entitled to recover the balance of the contract price of $1,097,615.96 and in addition thereto the reasonable cost of labor, materials and equipment caused to be furnished by Roberts & Schaefer Company as a result of plaintiff's breach of the contract amounting to $300,000.00, making a total of $1,397,615.96, with appropriate interest.

WHEREFORE, the defendant Roberts & Schaefer Company demands that the Complaint be finally dismissed and plaintiff recover nothing thereby; demand judgment against the plaintiff in the sum of $1,397,615.96, with interest; demands its costs and all appropriate relief.

(s) C. Kilmer Combs by A. S. Good
C. Kilmer Combs
Wyatt, Tarrant & Combs
1100 Kincaid Towers
Lexington, Kentucky 40507
(606) 233-2012

(s) Spencer D. Noe by A. S. Good
Spencer D. Noe
Stoll, Keenon & Park
1000 First Security Plaza
Lexington, Kentucky 40507
(606) 259-0444

Attorney for Defendants

(Certificate of Service omitted in printing.)

DEFENDANT'S EXHIBIT B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 82-434

LAKE COAL CO., INC., - - - - - *Plaintiff,*

v.

ROBERTS & SCHAEFER COMPANY, Et. Al., - *Defendants.*

REPLY—Filed December 23, 1982

Comes the plaintiff, and for its reply to the counterclaim of the defendant, Roberts & Schaefer Company, herein says:

(1) That this action has been improvidently removed from the Letcher Circuit Court, and it adopts all the allegations contained in its motion to remand filed herein.

(2) That this Court is without jurisdiction of the subject matter of this action.

(3) That the counterclaim fails to state a claim against the plaintiff upon which relief can be granted.

(4) That it admits the allegations contained in Paragraphs 2. and 3. of the separate answer of Roberts & Schaefer Company, except that it denies that the defendants, Darby Construction Company and Langley & Morgan Corporation, as subcontractors of Roberts & Schaefer Company, performed certain portions of the contract in a workmanlike manner in conformity with the contract; that it denies each and all the other allegations contained in the separate answer of Roberts & Schaefer Company and Paragraph 13. of the counterclaim.

(5) That it admits that it paid to Roberts & Schaefer Company the sum of $3,414,111. on the contract price; that it denied each and all the allegations contained in paragraphs 14., and 15. and 16. of the counterclaim, except those expressly admitted hereinabove.

(6) That the defendant, Roberts & Schaefer Company, breached said contract, negligently performed its work on the coal preparation plant, concealed, misrepresented and fraudulently performed certain obligations required under said contract, or breached the express and implied warranties contained in said contract and undertakings of material, equipment and work of good quality free from faults and defects, and the plaintiff relies on the aforesaid illegal and wrongful actions or omissions by the defendant, Roberts & Schaefer Company, as a complete bar to the counterclaim.

(7) That it adopts all the allegations contained in its complaint herein, and relies on the claims and damages asserted therein as a complete bar to the counterclaim.

WHEREFORE, the plaintiff demands that the counterclaim be dismissed and nothing recovered thereby; demands judgment in accordance with its complaint herein; demands its costs and all proper relief.

Plaintiff demands a jury trial of all issues triable by a jury.

(Certificate of Service omitted in printing.)

Reply—Filed December 23, 1982

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DEFENDANT'S EXHIBIT C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 82-434

LAKE COAL CO., INC., - - - - - - *Plaintiff,*

v.

ROBERTS & SCHAEFER COMPANY, Et. Al., - *Defendants.*

ORDER—Filed February 15, 1983

The plaintiff having moved the Court to remand this action to Letcher Circuit Court, from whence it was removed, on the grounds that this Court does not have original jurisdiction under the provisions of Title 28 U. S. Code, §1332(a)(1) and (c), and therefore, this action may not be removed to this Court, pursuant to the provisions of Title 28 U. S. Code, §1441; the defendants having responded thereto, and the Court being duly advised,

IT IS HEREBY ORDERED, as follows:

1. Plaintiff's motion to remand is SUSTAINED. It is obvious to the Court that the requisite diversity is lacking herein; therefore, this Court has no jurisdiction.

2. This action shall be, and is now, STRICKEN from the active docket of the Court.

This the 15th day of February, 1983.

(s) G. Wix Unthank,
G. Wix Unthank, Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff,*

v.

LAKE COAL COMPANY, INC., - - - - *Defendant.*

MEMORANDUM FOR DEFENDANT

Filed April 29, 1983

The complaint filed herein is the same suit pending by the same parties for the same cause previously filed in Letcher Circuit Court, Whitesburg, Letcher County, Kentucky, in Civil Action No. 82-CI-414. Lake Coal Company, the defendant herein, filed its complaint on November 12, 1982, in the Letcher Circuit Court, Roberts & Schaefer Company filed its answer and counterclaim therein on December 3, 1982, and Lake Coal Company, Inc., filed its reply on December 28, 1982.

It is the general rule that the court which first acquires jurisdiction shall proceed without interference from a court of another jurisdiction. The fact that the state court obtained jurisdiction over the cause of action through Roberts & Schaefer Company filing of its counterclaim therein, before it filed a similar action in the federal court, grants jurisdiction to the state court of the cause of action to the exclusion of the federal court until the state court's duty is fully performed and the jurisdiction involved in exhausted. *Gillis* v. *Keystone Mutual Casualty Company,*

172 F. 2d 826, *cert. den'd* 338 U. S. 822 (1949). See also, *Bowles* v. *Lee,* 59 F. Supp. 639 (D. C. Ky. 1945).

In *Mitter* v. *Massa.,* 237 F. Supp. 915 (D. C. NY. 1965), plaintiff art promoters sought, in the federal court action, an injunction directing the defendant artist to deliver his paintings pursuant to a contract entered into between the parties. The artist had earlier commenced an action against the promoters in a state court, their answer in which contained a counterclaim seeking the same relief as that sought in the action in the federal court. Therein, the court, as an exercise of its inherent powers, granted a stay of the proceeding because all the relief sought by the plaintiffs in the case had been requested in their counterclaim previously instituted in the state action, which was competent to dispose of the dispute between the parties.

There is a three-fold rationale why this court should dismiss the plaintiff's complaint or stay this action pending determination of the same or substantially same action before the Letcher Circuit Court. First, comity is the essential consideration recited by the federal courts in deferring to actions in state courts which have earlier acquired jurisdiction of the same matter in dispute between the parties and the federal action. *Hearing Aid Association of Kentucky, Inc.* v. *Bullock,* 413 F. Supp. 1032 (D.C. Ky. 1976). Comity is given a broad application as a general principle contraindicative of action by a federal court which will interfere with the proceedings and procedures in state court. So, in a number of cases the courts have recognized non-interference in state courts as a matter of judicial policy to be implemented by a dismissal or a stay of action in the federal court until the determination of the similar action pending in state court. In *Klanian* v. *New York L. Insurance Company,* 39 F. Supp. 777 (D.C. RI.

1941), the court granted a stay of proceeding stating that it was the duty of the federal court, in the exercise of comity, not to interfere with the orderly administration of justice in the state court except in a plain case of exceptional circumstances warranting such intereference. Similarly, the court in *Greer* v. *Scearce,* 53 F. Supp. 807 (D.C. Mo. 1944), stayed the proceeding in the federal court until the parties had had a reasonable opportunity to have the issues determined in the case previously pending in the state court in order to avoid the gratuitous interference with the orderly and comprehensive disposition of a state court litigation.

Secondly, the wastefulness inherent in duplicative litigation proceedings concurrently in state and federal courts has been generally recognized as another reason to dismiss or stay this action pending outcome of the similar action in the state court. See *Massachusetts* v. *Missouri,* 308 U. S. 1 (1939). In *P. Beiersdorf & Company* v. *Duke Laboratory, Inc.,* 92 F. Supp. 287 (D.C. NY. 1950), the federal court stayed the federal action pending adjudication of a similar action in state court noting that public policy required the court to actively avoid any waste of judicial time and energy. Because the courts are already heavily burdened with litigation with which they must, of necessity, deal, they should therefore, not be called upon to duplicate the state court's work in cases involving the same issues and same parties. *Reiter* v. *Universal Marion Corp.,* 173 F. Supp. 13 (D.C. D.C. 1959). Also, the defendant herein should not be harrassed and vexed with two actions pending in two separate courts over the same subject matter. *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.,* 89 F. Supp. 167 (D.C. NY. 1950). In *Greer* v. *Scearce, supra,* the court stayed the federal action pending adjudication

of a suit previously filed in the state court because the court held that it would be uneconomical as well as vexatious for the federal court to proceed in an action where another suit was pending in a state court presenting the same issues, not governed by federal law, between substantially the same parties. Similarly, the court in *Vanderwater* v. *City National Bank,* 28 F. Supp. 89 (D.C. Ill. 1939), held in abeyance a suit until adjudication of a pending cause in a state court because it was not seemly or proper for the parties to be subjected unnecessarily to the cost and expense of two different courts.

Thirdly, the court should dismiss the complaint or stay this action because the federal action does not include all the parties that are before the state court. In *Brendle* v. *Smith,* 46 F. Supp. 522 (D.C. NY. 1942), the court granted a stay of proceedings in federal court until a final determination of a similar suit in state court, noting that some of the parties named in the state suit were not included in the federal action. The court stated that because the state action was more inclusive than the federal action, it should be given the right of way to proceed. See also, *Reider* v. *Universal Marion Corp., supra,* and *Greer* v. *Scearce, supra.*

Actually, the Letcher Circuit Court is the proper venue and jurisdiction for the trial of the cause of action alleged originally in the counterclaim filed in state court by Roberts & Schaefer Company as is demonstrated by the fact that the same action was remanded to the state court by this Court pursuant to 28 U. S. Code §1447, for lack of original jurisdiction by order dated February 15, 1983, in Civil Action No. 82-434 as shown by Exhibit C filed with the defendant's motion herein. After having failed before to have its cause of action moved to federal court the plain-

tiff now tries, indirectly, to accomplish what this Court would not permit it to do directly even in the face of its prior counterclaim filed in the Letcher Circuit Court.

It is clear that the Court, in an exercise of its inherent powers, can also dismiss this action because the forum for adjudication was set in the state court when the plaintiff previously filed its counterclaim therein, which presents the same claim as it alleges in its complaint herein.

Therefore, the defendant respectfully submits that the complaint herein should be dismissed or stayed pending the disposition of the case in the Letcher Circuit Court, Civil Action No. 82-CI-414.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff*,

v.

LAKE COAL COMPANY, INC., - - - *Defendant*.

ANSWER AND COUNTERCLAIM—Filed April 29, 1983

ANSWER

Comes the defendant, and for its answer herein, says:

(1) That this action should be dismissed or stayed because the same action has been filed by the plaintiff against the defendant in Civil Action No. 82-CI-414 of the Letcher Circuit Court as removed to Civil Action No. 82-434 of the Federal District Court at Pikeville, and remanded to the Letcher Circuit Court by Order entered February 15, 1982.

(2) That this court is without jurisdiction of the subject matter of this action because same has been preempted by plaintiff's filing of the same action in the Letcher Circuit Court.

(3) That the complaint fails to state a claim against the defendant upon which relief can be granted.

(4) That it admits that the plaintiff is a corporation organized under the laws of the state of Delaware, but it is without sufficient knowledge or information upon which to form a belief about the other allegations contained in numerical paragraph 1. of the complaint, and therefore denies same.

(5) That is admits the allegations contained in numerical paragraph 2. of the complaint.

(6) That it admits the allegations contained in numerical paragraph 4. of COUNT I of the complaint, except it denies that a copy of the contract was attached to the copy of the complaint served on it.

(7) That it admits that the plaintiff entered into the performance of the contract to construct the coal preparation facility, but it denies each and all the other allegations contained in numerical paragraph 5. of COUNT I of the complaint.

(8) That it admits that the amount in controversy exceeds the sum of $10,000., exclusive of interest and costs, and admits that Paragraph 11. of the Contract entitled "FOUNDATIONS" provided that the defendant would have soil core borings taken and analyzed by a registered soils engineer, but it denies each and all the other allegations contained in numerical paragraph 3. of the complaint and numerical paragraph 6. of COUNT I of the complaint.

(9) That it admits that it paid the plaintiff the sum of $3,414,111. on the contract price, but it denies each and all the other allegations contained in numerical paragraph 7. of COUNT I of the complaint.

(10) That it denies each and all the allegations contained in numerical paragraph 8. of COUNT II of the complaint, except such as are admitted hereinbefore.

(11) That it denies each and all the allegations contained in numerical paragraphs 9., 10. and 12. of COUNT II of the complaint.

(12) That it admits that on February 16, 1983, plaintiff caused an alleged lien to be filed, which is recorded in Encumbrance Book 16, page 357 in the Letcher County Court Clerk's Office, but it denies that a certified copy of

the lien statement was attached to the copy of the complaint served on it; that it denies such lien statement, and its validity and all other allegations contained in numerical paragraph 11. of COUNT II of the complaint.

(13) That the plaintiff, Roberts & Schaefer Company, its agents, servants, employees and subcontractors breached said contract, negligently performed its work on the coal preparation plant, concealed, misrepresented and fraudulently performed certain obligations required under said contract, or breached the express and implied warranties contained in said contract and undertakings of material, equipment and work of good quality, free from faults and defects, and the defendant relies on the aforesaid illegal and wrongful actions or omissions by the plaintiff, its agents, servants, employees and subcontractors as a complete bar to the complaint.

(14) That it adopts all the allegations contained in its counterclaim herein, and relies on the claims and damages asserted therein as a complete bar to the complaint.

WHEREFORE, the defendant demands that the complaint be dismissed and nothing recovered thereby; that this action be stayed pending final adjudication of Civil Action No. 82-CI-414 in the Letcher Circuit Court; demands judgment in accordance with its counterclaim herein, and demands its costs and all other relief.

Defendant demands a jury trial of all issues triable by a jury.

COUNTERCLAIM

Comes the defendant, and for its counterclaim herein, says:

Answer and Counterclaim—Filed April 29, 1983

COUNT I

(1) That it adopts all the allegations contained in its answer above.

(2) That on September 14, 1981, the plaintiff and defendant entered into a contract whereby said plaintiff was to furnish the defendant a coal preparation facility, including washer plant, static thickener, refuse bin, and connections thereto, and provide the design, engineering, construction, installation and performance thereof on a "turn key" basis at the defendant's land site at Roxana, Letcher County, Kentucky, according to the specifications incorporated within said contract, for the payment of $4,228,000., provided therein; that said contract is referred to and the subject matter of plaintiff's complaint herein; that thereafter, certain additions were made to said contract for payment of $302,052.

(3) That Elgin National Industries, Inc., as parent company of Roberts & Schaefer Company, its subsidiary, the agents, servants and employees of said plaintiff acting in the course and scope of their employment, participated in the negotiation, inducement and performance of said contract in Letcher County, Kentucky, and Elgin National Industries, Inc., as aforesaid, undertook to advise, supervise, assist, participate with, and direct Roberts & Schaefer Company, in the furnishing of said coal preparation plant and the design, engineering, construction, installation and performance thereof as reasonably required to insure and facilitate the proper and timely performance of the work under said contract.

(4) That for the payments aforesaid, the plaintiff, Roberts & Schaefer Company, contracted, and Elgin National Industries, Inc., undertook as aforesaid, to properly furnish, design and install the coal washing plant facilities

Answer and Counterclaim—Filed April 29, 1983

aforesaid to operate with a washing capacity of three hundred (300) tons of coal per hour, for completion no later than April 1, 1982.

(5) That on or about September, 1981, the plaintiff, its agents, servants, employees, subcontractors and Elgin National Industries, Inc., began the actual performance of the obligations and work provided in the contract and undertakings aforesaid, and during the month of March, 1982, the plant was prepared for operational testing, and the static thickener thereof was filled with water for the purpose of settling and removing impurities from the coal washing water transmitted from the washing plant; that thereupon, the observation and inspection of the static thickener revealed that thousands of gallons of water leaked from the bottom of the tank because the concrete thereof had cracked and separated, and that the entire coal preparation facility was inoperable under the contract; that subsequent thereto, the testing, observation and inspection of the washing plant, conveyors and refuse bin, were demonstrated to be inoperable under the contract; that on April 1, 1982, and up to the present time, the entire coal preparation facility, including the washing plant, static thickener, conveyers and refuse bin, have been inoperable under said contract, and the substantial performance of said contract and undertakings by the plaintiff, its agents, servants, employees, subcontractors and Elgin National Industries, Inc. have failed.

(6) That since said plaintiff began its performance of the contract and undertakings aforesaid, and up to the present time, the said plaintiff, its agents, servants, employees and subcontractors, have illegally and wrongfully violated the contract and undertakings aforesaid, and il-

legally and wrongfully failed to perform the obligations thereof in the following respects:

(a) Said plaintiff failed to properly design, construct and install the static thickener of said facility and the bottom thereof according to reasonable and standard practices for such design, construction and installation, and in accordance with the specifications of the contract.

(b) Said plaintiff failed to design or install the concrete bottom of the static thickener to include sufficient reinforcement steel to keep it from cracking and leaking, according to reasonable and standard practices therefor.

(c) Said plaintiff failed to integrate the wire mesh intended for that purpose into the concrete bottom of the static thickener to keep it from cracking and leaking, according to reasonable and standard practices therefor.

(d) Said plaintiff failed to maintain a dry area where the concrete bottom of the static thickener was poured upon the earth in a circle area 75 feet in diameter, and in fact poured said concrete bottom upon wet saturated earth in disregard of the reasonable and standard practices therefor, and which actions contributed to cause the said concrete bottom to crack and leak.

(e) Said plaintiff constructed the foundation for the static thickener of said facility out of level contrary to the reasonable and standard practices therefor under the contract.

(f) Said plaintiff constructed the foundation for the refuse bin of said facility out of level contrary to the

reasonable and standard practices therefor under the contract.

(g) Said plaintiff failed to properly design, construct and install the washing plant, conveyor belts, refuse bin, and the components thereof, according to the reasonable and standard practices therefor under the contract, including but not limited to, causing faulty and inadequate operation of the welding, chutes, refuse, belts, gates, flow of refuse, rate of disposal, belt wipers, sieve bins, water dischargers, chemical feeds, switches, and the mechanisms thereof.

(h) Said plaintiff failed to design, construct and install said coal preparation facility, and the components thereof, to maintain the design feed rate of three hundred (300) tons of coal per hour for a sustained period of time under the specifications of the contract.

(7) That Darby Construction Company and Langley & Morgan Corporation, as subcontractors, agents, servants and employees of Roberts & Schaefer Company and Elgin National Industries, Inc., actually performed the obligations under said contract and undertakings aforesaid of pouring the concrete bottom of said static thickener, and illegally and wrongfully failed to properly integrate the wire mesh intended for that purpose into the concrete bottom thereof and failed to maintain the earth area thereunder in a dry condition, to prevent said concrete from cracking and leaking, according to reasonable and standard practices therefor under the contract.

(8) That the actions or omissions aforesaid of Roberts & Schaefer Company, Elgin National Industries, Inc., Darby Construction Company and Langley & Morgan Corporation, constitute breaches of the contract and under-

takings aforesaid, and constitute failure of substantial performance thereof.

(9) That the plaintiff knew, or should have known, the business of the defendant and its losses reasonably expected to be incurred in the event of substantial delay in the performance of the obligations under said contract and undertakings, for failure of the plaintiff to deliver proper operation of the coal preparation facility, and the components thereof, within the time provided in said contract and undertakings.

(10) That the illegal and wrongful actions or omissions and breaches of the plaintiff, its agents, servants, employees and subcontractors, aforesaid have proximately caused the defendant to suffer loss of expenses, wages, fees, travel, electricity and interest, in the sum of $454,047., and such additional sums thereof in the future as the evidence shall show.

(11) That the illegal and wrongful actions or omissions and breaches of the plaintiff, its agents, servants, employees and subcontractors, aforesaid have proximately caused the defendant to suffer loss by payments of required minimum royalties on coal leases held by the defendant which could not, and cannot, be mined as recoupment for lack of said coal preparation facility as contracted to be installed as aforesaid, in the sum of $1,133,479., and such additional sums in the future as the evidence shall show.

(12) That the illegal and wrongful actions or omissions and breaches of the plaintiff, its agents, servants, employees and subcontractors, aforesaid, have proximately caused the defendant to suffer loss of stockpiled coal it purchased in reliance upon the proper performance of said contract and undertakings by the plaintiff, in the sum of $625,000.

(13) That the illegal and wrongful actions or omissions and breaches of the plaintiff, its agents, servants, employees and subcontractors, aforesaid have proximately caused the defendant to suffer probable loss from contingent liabilities for loans and interest payments on behalf of contract miners in preparing to mine coal for said coal preparation facility, in the sum of $1,000,000.

(14) That the illegal and wrongful actions or omissions and breaches of the plaintiff, its agents, servants, employees and subcontractors, aforesaid have proximately caused the defendant to essentially cease its operations and be critically delayed in progress and completion thereof, and suffer loss of profits from business opportunities and long term coal contract opportunities with commercial, industrial and public utility purchasers of washed coal, which contracts could not be taken and entered into by reason of the illegal and wrongful delay, actions or omissions and breaches of the plaintiff, in the sum of $22,500,000., and such additional sums in the future as the evidence shall show.

COUNT II

(1) That the defendant reiterates, realleges and adopts each and all the allegations contained in the foregoing numerical paragraphs (1) - (7) and (9) of Count I hereof.

(2) That the actions or omissions of the plaintiff, its agents, servants, employees and subcontractors, aforesaid were due to the carelessness and negligence of the plaintiff, its agents, servants, employees and subcontractors, in the design, engineering, construction and installation of the aforesaid washing plant, static thickener, conveyers and refuse bin, in the particulars as enumerated in numerical paragraph (6) (a) - (h) and (7) of Count I hereof, which are adopted herein by reference.

(3) That as a proximate result of the carelessness and negligence of the plaintiff, its agents, servants, employees and subcontractors, as aforesaid, the defendant was caused to, and will, suffer the losses and in the sums as specifically enumerated in numerical paragraphs (10) - (14) of Count I hereof, which are incorporated herein by reference.

COUNT III

(1) That the defendant reiterates, realleges and adopts each and all the allegations contained in the foregoing numerical paragraphs (1) - (7) and (9) of Count I hereof.

(2) That the illegal and wrongful actions or omissions of the plaintiff, its agents, servants, employees and subcontractors, in designing, constructing and installing the foundations for the static thickener and refuse bin of said facility out of level contrary to the reasonable and standard practices therefor and other illegal and wrongful actions or omissions of the plaintiff, its agents, servants, employees and subcontractors, specifically enumerated in numerical paragraph (6) (a) - (h) of Count I hereof, which are adopted herein by reference, are shoddy, faulty and defective work, and were realized and known, or should have been known, by the plaintiff sufficiently early in the contract period within which to have remedied same when originally done, and thereby avoid harm and loss to the defendant, but the plaintiff, its agents, servants, employees and subcontractors concealed and misrepresented such illegal and wrongful actions or omissions to the extent and for the period that such constitutes fraud upon the defendant therefor.

(3) That as a proximate result of the concealment, misrepresentation and fraud of the plaintiff, its agents, servants, employees and subcontractors, aforesaid, the defendant suffered the losses and in the sums as specifically enumerated in numerical paragraphs (10) - (14) of Count I hereof, which are adopted herein by reference

COUNT IV

(1) That the defendant reiterates, realleges and adopts each and all the allegations contained in the foregoing numerical paragraphs (1) - (7) and (9) of Count I hereof.

(2) That the illegal and wrongful actions or omissions of the plaintiff, its agents, servants, employees and subcontractors, as enumerated in numerical paragraph (6) (a) - (h) and (7) of Count I hereof, which are incorporated herein by reference, constitute breaches, failures and violations of the express and implied warranties contained in said contract and undertakings of material, equipment and work of good quality, free from faults and defects, and illegally and wrongfully resulted in said coal preparation facility, and its component parts, being totally unfit for the purpose intended and guaranteed by the plaintiff, its agents, servants, employees and subcontractors, under said contract and undertakings.

(3) That as a proximate result of the illegal and wrongful actions or omissions of the plaintiff, its agents, servants, employees and subcontractors, as aforesaid, the defendant has suffered the losses and in the sums as specifically enumerated in numerical paragraphs (10) - (14) of Count I hereof, which are incorporated herein by reference.

WHEREFORE, the defendant demands judgment against the plaintiff as follows:

(a) That it recover of the plaintiff the sum of $454,047., with legal interest thereon from date of payment, for expenses, wages, fees, travel, electricity and interest, and

such additional sums in the future as the evidence shall show, as aforesaid.

(b) That it recover of the plaintiff the sum of $1,133-479., with legal interest thereon from date of payment, for lost payments of minimum royalties, and such additional sums in the future as the evidence shall show, as aforesaid.

(c) That it recover of the plaintiff the sum of $625,000., with legal interest thereon from April 2, 1982, for loss of stockpiled coal, as aforesaid.

(d) That it recover of the plaintiff the sum of $1,000,-000., with legal interest thereon from date of payment, for probable loss from contingent liabilities, as aforesaid.

(e) That it recover of the plaintiff the sum of $22,500,-000., with legal interest thereon from April 2, 1982, for lost profits, as aforesaid.

(f) That the plaintiff's complaint be dismissed and nothing recovered thereby or these proceedings stayed, in accordance with its answer aforesaid.

(g) For its attorney fees and costs herein expended and all proper relief.

The defendant demands a jury trial of all issues triable by a jury.

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(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY,
a Delaware corporation, - - - - *Plaintiff,*

v.

LAKE COAL COMPANY, INC.,
a Kentucky corporation, - - - *Defendant.*

RESPONSE TO MOTION TO DISMISS OR STAY

Filed May 6, 1983

The Plaintiff, for response to the Motion of Defendant to Dismiss or Stay this proceeding, says that by Act of Congress (Title 28 U.S. Code, §1332) this Plaintiff is entitled as a matter of right to invoke federal jurisdiction as it has done in this instance. This motion is without merit and should be denied. A more specific and detailed explanation of Plaintiff's position follows.

1. *The Factual Background.*

On September 14, 1981, the parties to this action entered into a contract by the terms of which Roberts & Schaefer Company (called "Roberts & Schaefer") agreed to design and construct a coal preparation facility for Lake Coal Company (called "Lake"). The plant was designed and constructed on the property of Lake Coal Company at Roxana in Letcher County, Kentucky. Lake paid a substantial portion of the contract price, but still owes $1,-

397,615.96 according to Roberts & Schaefer. On the other hand, Lake claims that the facility was not properly designed and constructed by Roberts & Schaefer, Lake owes nothing and Lake claims additional damages for breach of contract.

(a) The State Court Action.

After the dispute arose, Lake filed a Complaint on November 12, 1982 in the Letcher Circuit Court, against Roberts & Schaefer and two of its contractors (with whom Lake had no privity of contract). The sole purpose in naming the two subcontractors, which were Kentucky corporations, was to deprive Roberts & Schaefer of a federal forum by destroying diversity of citizenship, Lake being a Kentucky corporation. Roberts & Schaefer removed, asserting that the claim against the subcontractors was a sham, but this Court remanded on the sole ground of lack of diversity. The Remand Order was entered February 15, 1983, and the case was remanded to the Letcher Circuit Court, where it now reposes. The record in the Letcher Circuit Court remains the same as at remand: The Complaint, Answer and Counterclaim and Reply (see the record in Civil Action No. 82-434 in this Court). The only proceeding since remand was the service by Roberts & Schaefer in the state court proceedings of the identical First Set of Interrogatories and First Request for Production of Documents as served in this Court.

The parties are initiating discovery by deposition in June on dates which have been agreed between counsel, the depositions to be taken in both the state and federal cases.

(b) The Instant Action.

This action was commenced April 6, 1983 (shortly after remand) in the United States District Court at Pikeville

by Roberts & Schaefer, a Delaware corporation with its principal place of business in Illinois, against Lake, a Kentucky corporation with its principal place of business in Kentucky. Pure diversity jurisdiction exists.

The thrust of the instant action is to recover the balance of the monies due on the contract and to assert a Mechanic's and Materialman's Lien filed on the property of Lake pursuant to Kentucky statutes.

Lake answered and counterclaimed, denying any monies due, claiming Roberts & Schaefer breached the contract by improperly designing and constructing the coal preparation facility, and seeking damages. Roberts & Schaefer denies the counterclaim by reply.

(c) The Comparative Status of the Proceedings.

The proceedings in both the state and federal courts are at the same stage. The pleadings are made up in both cases. Roberts & Schaefer has initiated discovery through the service of interrogatories and requests to produce. Both Roberts & Schaefer and Lake will commence discovery in both actions by deposition during the month of June. Both actions are in their early discovery stages.

(d) The Existence of an Important State Interest.

This is an action wherein this Court has jurisdiction based solely on diversity of citizenship. It does not involve any state-federal relations. No state court has taken possession of any res, and the concurrent progress of this action will not impede or affect the state court action. There is no countervailing state interest.

2. *Memorandum of Authorities*

(a) The Right to a Federal Forum.

Roberts & Schaefer, an Illinois corporation, is expressly granted a federal forum in an action against a Kentucky citizen by the Congress of the United States under Title 28, U. S. Code, §1332(a)(1) and (c). The right to a federal forum is not to be taken lightly or summarily dismissed. *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976).

In *Moses H. Cone Hospital* v. *Mercury Constr.,* ___ U. S. ____, 103 S. Ct. ____, 74 L. Ed. 2d 765 (decided February 23, 1983), the Supreme Court of the United States had before it the review of a stay order entered by a District Court, which had been overturned by the Circuit Court of Appeals. The Supreme Court granted certiorari and stated the issue in this fashion at 74 L. Ed. 2d 778:

> We now turn to the principal issue to be addressed, namely the propriety of the District Court's decision to stay this federal suit out of deference to the parallel litigation brought in state court. Colorado River Water Conservation District v. United States, 424 U. S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976), provides persuasive guidance in deciding this question.

The duty of the federal court to exercise the jurisdiction conferred upon it by the Congress is dealt with by the Supreme Court in *Moses H. Cone Hospital* through the following comments on the *Colorado River* decision, at 74 L. Ed. 2d 779:

> We noted that " 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction,' " and

that the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them" We continued:

> 'Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist.' *Id.,* at 818, 47 L. Ed. 2d 483, 96 S. Ct. 1236.

We declined to prescribe a hard and fast rule for dismissals of this type, but instead described some of the factors relevant to the decision.

And in *Moses H. Cone Hospital* the Court went on to deal with the "absention" doctrine, again construing *Colorado River* in this language at 74 L. Ed. 2d 779:

> We began our analysis by examining the absention doctrine in its various forms. We noted:
>
> > 'Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'
>
> After canvassing the three categories of absention, we concluded that none of them applied to the case at hand. 424 U. S. at 813-817, 47 L. Ed. 2d 483, 96 S. Ct. 1236.

In *Moses H. Cone Hospital* the state court action was commenced some nineteen days before the federal action. The hospital argued that the prior filing gave the state court priority. In response to that, the Supreme Court said at 74 L. Ed. 2d 783:

> That aside, the Hospital's priority argument gives too mechanical a reading to the "priority" element of the Colorado River balance. This factor, as with the other Colorado River factors, is to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand. Thus, priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions.

The Court will readily observe that here both the federal action and the state action have reached approximately the same point procedurally and there is no just reason to prefer the state court action.

In *Moses H. Cone Hospital,* the Supreme Court of the United States mandated the "virtually unflagging obligation" of the federal courts to exercise jurisdiction and dissolved the District Court stay.

(b) The Parties to this Action.

Lake suggests the federal action be stayed because the two contractors are parties in the state court and not here.

But we have pointed out that Lake made them parties in the state court as diversity destroyers and not because they were necessary or even proper. The contract was between Lake and Roberts & Schaefer alone, and Lake had no contractual connection, or privity, with the contractors.

The "defect of parties" claim simply doesn't exist in fact. The contractors are not parties to the contract sued on. But even if they were, they are not necessary parties. By express statute, Roberts & Schaefer has the option to sue Lake alone. KRS 411.180 provides:

> If two or more persons be jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option.

The "defect of parties" issue is without substance, injected to detract from the right to the federal forum granted by Congress. The claimed defect should be rejected.

(c) The Request for a Stay.

Lake may well say to this Court in the alternative a stay should be granted even if dismissal is improper. But the practical effect of a stay is a dismissal. The Supreme Court made this plain in *Moses H. Cone Hospital, supra,* at 74 L. Ed. 2d 776, in this language:

> Hence, a stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be res judicata. Thus, here, even more surely than in Idlewild, Mercury was 'effectively out of the court.' Hence, as the Court of Appeals held, this stay order amounts to a dismissal of the suit.

(d) Dismissal is Improper.

The right to a federal forum where expressly granted by Congress must prevail over a prior state action. Otherwise, the will of Congress would become a nullity. And it could be thwarted by the filing of the first action in state court including as defendants selected parties to destroy diversity. In reality, the battle here is between Roberts & Schaefer on the one hand and Lake on the other, citizens of different states. It is a contest which qualifies for a federal forum, and this Court should not deprive them of that forum.

This question has come before other judges in the Eastern District of Kentucky. For example, in *Ralph Mullins, et al.* v. *Brushy Creek Coal Company, et al.,* Civil No. 77-14, United States District Court at Catlettsburg, Mullins and the other plaintiffs had previously commenced an action in the Elliott Circuit Court claiming wrongful mining of their coal. They later commenced the above diversity action in the United States District Court at Catlettsburg making the same claim. The defendants, one of which was represented by the undersigned, moved to dismiss on the ground that there was an identical prior action pending in the state court filed by the same plaintiffs. Judge Hermansdorfer denied the motion, rejecting our position in this language:

> Defendants' second ground for dismissal, the pendency of the same action between the same parties in a state court, is, without more, without merit. Plaintiffs' action does not fit within the category of cases over which federal courts traditionally decline to exercise diversity jurisdiction in deference to state courts, such as probate and domestic relations cases. See 13

Wright, Miller, & Cooper, *Federal Practice and Procedure,* §3609. As a general rule, the mere fact that the same case is also pending in state court is no ground for dismissal, unless the case fits within the class of cases to which the equitable doctrine of federal court abstention applied. *Colorado River Water Conservation District* v. *United States,* 424 U. S. 800, 813-819 (1976). Defendants' 'multiplicity of actions' argument simply does not remove this action from the confines of the general rule, and therefore, dismissal on this basis is also unwarranted. See *Carr* v. *Grace,* 516 F. 2d 502, 503 (5th Cir. 1975).

Accordingly, It Is Ordered And Adjudged Herein As Follows:

(1) That the motion of defendant Brushy Creek Coal Company to dismiss be, and the same hereby is, Overruled.

(2) That the motion to dismiss made by defendants James R. Lewis and Pauline Lewis be, and the same hereby is, Overruled.

(3) That the motion to dismiss made by defendant Addington Brothers Trucking, Inc., be, and the same hereby is, Overruled.

(4) That the motion to dismiss made by defendant Addington Brothers Mining, Inc. be, and the same hereby is, Overruled.

This the *23* day of May, 1977.

H. David Hermansdorfer

Judge

(Filed May 23, 1977)

Further argument would be useless. It is now clear this is simply a diversity action where the Plaintiff is congressionally granted right to a federal forum. That right should not be denied.

3. *Defendant's Authorities.*

In *Colorado River,* at 424 U. S. 814 - 817, and 47 L. Ed. 2d 496 - 498, the three areas justifying federal abstention in deference to state court actions are described. They are (1) where state court construction of a state law may render a federal constitutional question moot, (2) where the action involves difficult questions of state law "on policy problems of substantial public import whose importance transcends the result in the case at bar", and (3) where federal jurisdiction has been invoked to restrain state proceedings. None apply here.

The authorities cited by Defendant are generally abstention-related cases. In the light of *Moses H. Cone Hospital* (1983) and *Colorado River* (1976), these older District Court cases are neither indicative of the present state of the law nor persuasive, but they may be explained as inapplicable here. We do so.

(a) *Gillis* v. *Keystone Mut. Casualty Co.,* 172 F. 2d 826 (6th Cir. 1949). There a state court receiver of insolvent Keystone had been appointed. Federal jurisdiction was invoked to oust the state court receiver. The abstention doctrine was applied.

(b) *Bowles* v. *Lee,* 59 F. Supp. 639 (E. D. Ky. 1945). Federal jurisdiction was invoked to enjoin an ejectment proceeding in the state court. The injunction was denied.

(c) *Mitter* v. *Massa,* 237 F. Supp. 915 (S. D. N. Y. 1965). A stay was granted where preliminary injunc-

tion was sought in federal court when the matter was ripe for decision in the state court.

(d) *Hearing Aid Ass'n. of Kentucky, Inc.* v. *Bullock,* 413 F. Supp. 1032 (E. D. Ky. 1976). Action to enjoin the Attorney General of Kentucky from prosecution state court actions authorized by Kentucky law to prohibit illegal sale of hearing aids. The doctrine of abstention was applied.

(e) *Greer* v. *Searce,* 53 F. Supp. 807 (W. D. Mo. 1944). A declaratory judgment action involving title to land. All interested parties were joined in the state court action. All were not joined in federal court. Under the state of the records in both cases the court refused to dismiss but did stay.

(f) *Massachusetts* v. *Missouri,* 308 U. S. 1, ____ S. Ct. ____, 84 L. Ed. 3 (1939). Massachusetts sought to invoke original jurisdiction of the Supreme Court. The United States District Court for Missouri had jurisdiction. The Supreme Court declined to accept jurisdiction. The states were not the real parties in interest, and the real parties in interest had an adequate forum in the District Court.

(g) *P. Biersdorph & Co.* v. *Duke Laboratories,* 92 F. Supp. 287 (S. D. N. Y. 1950). The state court action had been tried and was on appeal. The federal action for trademark infringement was stayed.

(h) *Reiter* v. *Universal Marion Corporation,* 173 F. Supp. 13 (D. C. 1959). The state court suit was ready for judgment. Parties in the federal court were incomplete. The federal proceeding was stayed.

(i) *Maternally Yours* v. *Your Maternity Shop,* 89 F. 2d 167 (S. D. N. Y. 1950). Trademark infringement case. Plaintiff filed suit first in state court and later

in federal court. Held - federal action will be stayed unless Plaintiff agreed not to prosecute state court case.

(j) *Vanderwater* v. *City Nat'l. Bank of Kankakee, Ill.,* 28 F. Supp. 89 (E. D. Ill. 1939). Federal jurisdiction was invoked to surcharge an accounting in a probate matter pending in state court. Abstention was decreed.

(k) *Klanian* v. *New York Life Ins. Co.,* 39 F. Supp. 777 (D. R. I. 1941). State court action had been tried and appealed. The federal court stayed.

(l) *Brendle* v. *Smith,* 46 F. Supp. 522 (S. D. N. Y. 1942). A stay was granted under the peculiar facts, including the involvement of the defendant in the war effort (World War II).

We do not suggest defendants authorities are trite or valueless. We could have cited many more cases with tones more pleasing to our ears. But the law announced by the Supreme Court in this area is so new and clear we would do this court a disservice by hunting and picking favorable cases, burdening the court with sheer bulk rather than controlling authority. We submit that *Moses H. Cone Hospital,* and *Colorado River,* are decisive.

CONCLUSION

The motion of the Defendant for dismissal or stay should be denied.

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Response to Motion to Dismiss or Stay—Filed May 6, 1983

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Affiant, C. KILMER COMBS, says he is one of the attorneys for the Plaintiff and that the factual statements contained in the foregoing Response relating to the status of both the federal action and the state court action are true.

(s) C. Kilmer Combs
C. Kilmer Combs

STATE OF KENTUCKY }
COUNTY OF FAYETTE }

Subscribed and sworn to before me by C. Kilmer Combs, this 5th day of May, 1983.

My Commission Expires: October 5, 1986.

(s) Juanita M. Wheeler
Notary Public, State at Large
Kentucky

(Certificate of Service omitted in printing.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff,*

v.

LAKE COAL COMPANY, INC., - - - *Defendant.*

REPLY MEMORANDUM FOR DEFENDANT

Filed May 16, 1983

DISMISSAL IS PROPER

The plaintiff's response asks this court to deny the defendant's motion to dismiss or stay for the sole reason that it has a right to a federal forum for its cause of action. It reasons that "the right to a federal forum where expressly granted by Congress must prevail over a state action, otherwise the law of Congress would become a nullity." Contrary to the plaintiff's allegations, 28 U.S.C. 1332 grants only a "statutory *privilege* of access to a federal court *which is not absolute*". *P. Beiersdorf & Company, Inc.* v. *Duke Laboratories,* 92 F. Supp. 287 (S.D. N.Y., 1950). As stated by the Supreme Court in *Brillhart* v. *Excess Insurance Company,* 316 U. S. 486, 494 (1942), although the district court may have jurisdiction of the action, it is "under no compulsion to exercise that jurisdiction". This is particularly true where a parallel action has been previously filed in state court involving the same parties and issues. *Will* v. *Calvert Fire Insurance Company,* 437 U. S. 660 (1978). The law is clear that the dis-

trict court has the power to dismiss or stay proceedings pending adjudication of a parallel action in state court as an exercise of its inherent power to control the disposition of the cases on its docket with economy of time and effort for the court, for counsel and for the litigants. *Landis* v. *North American Company,* 399 U. S. 248 (1936). The decision of whether to defer this action to the concurrent jurisdiction of the state court is, in the last analysis, a matter committed to this court's sound discretion. *Will* v. *Calvert Fire Insurance Company, supra.* In *Brillhart* v. *Excess Insurance Company, supra,* Mr. Justice Felix Frankfurter, writing for the majority, stated;

> "Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a . . . suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." at p. 495.

Under the application of the cases cited in its memorandum, and for the reasons stated therein, the defendant submits that the warning of Mr. Justice Frankfurter to avoid gratuitous interference with the concurrent state action should be heeded by this honorable court and the defendant's motion to dismiss or stay be granted.

Thermtron Products, Inc. v. *Hermansdorfer,* 423 U. S. 336 (1975), cited by the plaintiff in support of its argument, is inapplicable. Therein, the issue raised in the Supreme Court was whether the district court could remand an action to state court for grounds other than as provided in 28 U.S.C. 1446, 1447. The question of remand has been properly disposed of in the present action.

RECENT SUPREME COURT DECISIONS

Recent Supreme Court cases, including those cited by the plaintiff, demonstrate that under the circumstances herein presented, the federal action should be dismissed or stayed pending adjudication of the same action in the state court.

In *Colorado River Water Conservation District* v. *United States, supra,* the United States filed an action in federal court against some 1,000 water users seeking adjudication of reserved water rights. One defendant, thereafter, brought suit in state court for purposes of adjudicating all of the government's claims which were also raised in the federal action. On motion of the defendant water user, the federal court dismissed its action pending adjudication of the state proceeding. The court of appeals reversed the action of the district court. On certiorari, the Supreme Court reversed the court of appeals and affirmed the judgment of the district court. Although the Court found that the case did not fall within any of the classic abstention categories, it nevertheless affirmed the dismissal of the federal action on principles which "rest on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." The three factors considered by the court therein were, 1) the inconvenience of the federal forum; 2) the desirability of avoiding piece-meal litigation; and 3) the order in which jurisdiction was obtained by the concurrent forums.

In discussing this case the plaintiff in its response seizes upon the language of the court regarding its "unflagging obligation" to exercise jurisdiction but ignores the fact that the Court *upheld the correctness of the district court's final decision to dismiss* because of concurrent jurisdiction. The

plaintiff makes the same error in application of *Colorado River Water Conservation District, supra,* to the facts herein presented that the court of appeals made in *Will* v. *Calvert Fire Insurance Company, supra.*

In that case, Calvert advised American Mutual Insurance Company (American) that it was rescinding its membership in a reinsurance pool American operated. American filed an action in state court to declare the agreement with Calvert in full force and effect. Calvert answered and affirmatively plead that American had violated the Securities Act of 1932, Rule 10-b5 of the Security Exchange Act of 1934, and Illinois Securities Act and counterclaimed for damages on all defenses claimed except the claim involving violation of Rule 10-b5 which was exclusively within the jurisdiction of the federal courts. Calvert also filed an action in federal court for damages, for the Rule 10-b5 violation and joined therewith claims based on each of the other defenses raised in the state action. Upon motion of American, the district court granted a stay of the federal action because of the pending parallel state action. The court of appeals entered a mandamus order directing the judge to proceed immediately with Calvert's claim for damages based upon the language of *Colorado River Water Conservation District, supra,* as aforestated. On certiorari, the Supreme Court reversed the court of appeals and affirmed the district court's stay order. Applying *Brillhart* v. *Excess Insurance Company, supra,* the court held that;

> . . . "a district court's decision to defer proceedings because of the concurrent state litigation is generally committed to the discretion of that court. No one can seriously contend that a busy federal trial judge, confronted both with competing demands on his time for

> matters properly within his jurisdiction and with inevitable scheduling difficulties because of the unavailability of lawyers, parties and witnesses is not entrusted with a wide latitude in setting his own calendar." at p. 665.

It is not surprising that the plaintiff failed to cite *Will* v. *Calvert Fire Insurance Company, supra,* in its discussion of recent Supreme Court decisions. These cases clearly demonstrate that this Court can dismiss this action in deference to the state action.

In *Moses H. Cone Hospital* v. *Mercury Construction Corporation, supra,* the Supreme Court affirmed the court of appeals' reversal of a stay order because it found that the defendant had made no showing of circumstances to justify the stay of the federal action.

Although the court reversed the stay order, the defendant submits that a careful analysis of *Moses H. Cone Hospital, supra,* indicates that the present action should be dismissed or stayed because the critical facts not present in *Moses H. Cone Hospital, supra,* which lead to the reversal of the stay order, are present in the case at bar.

First, the Court in *Moses H. Cone Hospital, supra,* noted that there was no contention that the federal forum was any less convenient to the parties than the state forum. Herein, because of the nature of the suit, and because the distance to federal court from the facility negligently designed, constructed and installed by the plaintiff is more than twice the distance to the situs of the state court, the federal forum is less convenient.

Secondly, and more importantly, the Court in *Moses H. Cone Hospital, supra,* found that the concurrent federal action did not cause a piece-meal resolution of parties' underlying disputes. Because all the parties before the

state court are not present in the federal action, herein, a piece-meal resolution of the issues raised concurrently in the federal and state action will be necessary unless this action is dismissed or stayed pending adjudication of the more inclusive state action.

Thirdly, in *Moses H. Cone Hospital, supra,* the Court found that although the state action was first filed, the parties, in the federal action had taken most of the steps necessary to resolve the issue therein presented whereas there were no substantive proceedings in the state action. As the plaintiff is quick to point out to this court, the federal action has proceeded no further towards resolution than the state action. The defendant submits that the reason that the state action has not proceeded further is due to the actions on the part of the plaintiff in wrongfully removing the action from state court. Moreover, the defendant would ask the court to take note that the plaintiff propounded interrogatories in the federal action with the complaint so as to put itself in a posture to argue that the progress of the concurrent actions were similar. The fact is that the action was filed in state court some four months prior to the institution of the federal action and the state court should hold jurisdiction of the cause of action to the exclusion of the federal court until the state court's duty is fully performed and the jurisdiction involved is exhausted. *Callis* v. *Keystone Mutual Casualty Company,* 172 F. 2d 826 (6th Cir., 1949). See also, *Bowles* v. *Lee,* 59 F. Supp. 639 (D. C. Ky. 1945).

Fourthly, *Moses H. Cone Hospital, supra,* dealt with issues of federal law and federal policy. As the Court noted, "the presence of federal law issues must always be a major consideration weighing against surrender of the action" to the state court. As the defendant pointed out in its motion, there are no federal issues presented which

require the particular expertise of the district court. Rather, this is an action based upon diversity jurisdiction which requires this court to apply state law in the resolution of all substantive issues. See, *Will* v. *Calvert Fire Insurance Company, supra.*

Lastly, the Court in *Moses H. Cone Hospital, supra,* found that the state proceeding was inadequate to protect the rights of the plaintiffs in the federal action. There is no indication that the rights of the plaintiff herein will not be adequately protected in the state action. See, *Brendle* v. *Smith,* 46 F. Supp. 522 (S. D., N. Y. 1942). The Supreme Court stated that it reversed the stay order because there was a substantial doubt that the state court litigation would be an adequate vehicle for the complete and prompt resolution of the issues between the parties. In the present action no question is raised to even indicate that the state court litigation would be an inadequate vehicle for the complete and prompt resolution of the issues between the parties. The only contention raised by the plaintiff is that it should be allowed to proceed in the forum of its choice based upon a right which does not exist.

The defendant submits that because this court is already heavily burdened with litigation with which it must, of necessity deal, it should not be called upon to duplicate the state court's work in cases involving the same issues and same parties. *Reider* v. *Universal Marion Corp.,* 173 F. Supp. 13 (D. C. D. C. 1959). The defendant should not be harrassed and vexed with two actions pending in two separate courts over the same subject matter. *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.,* 89 F. Supp. 167 (D. C. N. Y. 1950). Nor, should this defendant be subjected to the costs and expense of two different courts deciding the same issue based on state law in an action between the same parties. *Vanderwater* v. *City National Bank,* 28 F.

Supp. 89 (D. C. Ill. 1939). The defendant submits that this court should heed Mr. Justice Frankfurter's warning against gratuitous interference with the orderly and comprehensive disposition of the state court litigation and this action should be dismissed or stayed.

APPROACH OF FEDERAL DISTRICT COURTS IN KENTUCKY

In *Hearing Aid Association of Kentucky* v. *Bullock,* 413 F. Supp. 1032 (D. C. Ky. 1976), Judge Siler dismissed a concurrent federal action in deference to the state action which involved the same issues and parties. The court cited, with approval, the reasoning of the Supreme Court in *Taylor* v. *Tainter,* 83 U. S. 366, 370 (1882), which stated;

> "Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is fully exhausted; and this rule applies alike in both civil and criminal cases."

Similarly, the Supreme Court's decision in *Colorado River Water Conservation District, supra,* demonstrates that a dismissal of the federal action in deference to the state action, under the circumstances herein presented, is proper.

On the other hand, the plaintiff cites to this court, as authority for its argument, an unpublished opinion of Judge Hermansdorfer. Even the plaintiff's counsel knows that an unpublished opinion is neither authoritative nor persuasive. The defendant submits that the opinion of Judge Siler, which is in keeping with the most recent Supreme Court cases, as previously discussed, properly re-

flects the approach applied by the district courts in Kentucky. *Hearing Aid Association of Kentucky, supra,* is both authoritative and persuasive.

Therefore, the defendant respectfully submits that the complaint herein should be dismissed or stayed pending disposition of the state action between the same parties and presenting the same issues.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY - - - *Plaintiff*

v.

LAKE COAL COMPANY, INC. - - - *Defendant*

RESPONSE TO DEFENDANT'S REPLY MEMORADUM—Filed May 19, 1983

We respond solely to preclude misconception.

Defendant cites *Brillhart* v. *Excess Ins. Co. of America,* 316 U. S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942) as holding a district court is "under no compulsion to exercise (its) jurisdiction."

A careful reading of the case discloses the issue to be whether a district court has a discretion to entertain a declaratory judgment action under 28 USC §2201. The statute says the court "may declare the rights" and the Supreme Court held that is discretionary.

Declaratory judgment deals with the remedy, and not jurisdiction. It is not relevant here.

Otherwise there is nothing new in the Reply.

Response to Defendant's Reply Memorandum

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY - - - *Plaintiff*

v.

LAKE COAL COMPANY, INC. - - - *Defendant*

SUPPLEMENTAL MEMORANDUM OF PLAINTIFF

Filed May 25, 1983

Defendant suggests that plaintiff is trying to ignore the case of *Will* v. *Calvert Fire Insurance Co.*, 437 U. S. 655, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978). Not so, and we felt that the Court would agree that it does not apply from a casual reading of the Opinion.

In *Will*, the issue before the Supreme Court was the propriety of granting a writ of mandamus against Judge Will, the District Judge who had stayed the federal proceeding. The Supreme Court stated the issue this way at 437 U. S. 657, 658:

> "We granted certiorari to consider the propriety of the use of mandamus to review a District Court's decision to defer two concurrent state proceedings, and we now reverse."

The Supreme Court reversed the writ of mandamus issued by the Circuit Court of Appeals and pointed out the distinction between a mandamus proceeding, such as *Will*, and appeals in the ordinary course such as *Moses H. Cone Hospital* (1983) and *Colorado River* (1976). Since this is

not a mandamus proceeding, we found no relevancy in *Will* v. *Calvert Fire Insurance Co., supra.*

We do not want the last word, but we believe and hope that everyone has had their say. We leave the matter with the Court's good judgment.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff,*

v.

LAKE COAL COMPANY, INC., - - - *Defendant.*

ORDER—Filed July 15, 1983

The defendant has moved the Court to dismiss or stay this action pending resolution of an action involving the same issues and the same parties, et al., in Letcher Circuit Court (Civil Action No. 82-CI-414). The Court has considered the parties' responses and replies to responses to defendant's motion herein and is of the opinion that no good cause has been shown to justfy litigating these same issues simultaneously in two different judicial systems. The Court being so advised,

IT IS HEREBY ORDERED, that in the interests of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court.

This the 14th day of July, 1983.

(s) G. Wix Unthank
G. Wix Unthank, Judge

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Case No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee*

APPELLANT'S MOTION FOR SUMMARY REVERSAL, OR FOR ADVANCEMENT

Filed Sept. 9, 1983

The Appellant, Roberts & Schaefer Company (called "R&S"), respectively moves the Court:

1. To summarily vacate the order staying these proceedings, and remand forthwith for further proceedings, because clear error was committed under the recent decision of the Supreme Court of the United States in *Moses H. Cone Hospital* v. *Mercury Const.*, ____ U. S. ____, 103 S. Ct. ____, 74 L. Ed. 2d 765 (February 23, 1983); or in the alternative.

2. To advance this cause for oral argument and submission at the earliest convenience of the court. This motion is made under Rule 9(d)(4) of this Court. The grounds for this motion are more particularly set forth below.

THE DISPUTE

Lake Coal Company (called "Lake") is a Kentucky corporation with substantial coal mining operations in

Letcher County, Kentucky. On September 14, 1981, R&S, a Delaware corporation headquartered in Chicago, entered into a written contract with Lake to construct a coal washing plant in Letcher County, Kentucky for a contract price of $4,228,000.

The plant was constructed. During construction problems were encountered, each party blaming the other. R&S claims it completed construction per the contract, and therefore says it is entitled to the balance of the contract Price. Lake asserts the plant was defectively designed and built and has not been completed, and therefore denies R&S is entitled to payment and further asserts it is entitled to damages in excess of $25 million for breach of contract.

THE LITIGATION

On November 12, 1982, Lake filed a state court action in the Letcher Circuit Court, naming R&S and two subcontractor Kentucky corporations as defendants seeking over $25 million for breach of contract [A. 296]. Lake had no contractual connection with the subcontractors. R&S removed, asserting in its petition for removal that no claim of substance was made against the two Kentucky defendants and their presence was a sham to prevent removal [A. 314]. R&S answered, counterclaiming for the balance of the contract price due [A. 321]. Lake moved to remand [A. 334]. R&S responded [A. 367]. On February 15, 1983, the District Court remanded [A. 379].

R&S, desiring a federal forum, instituted this diversity action in the United States District Court for the Eastern District of Kentucky on April 6, 1983, seeking recovery of the balance of the contract price and asserting a materialman's lien on the coal processing plant [A. 3]. Lake

filed its answer and counterclaim for breach of contract [A. 220]. The issues were completed by reply [A. 250].

Lake moved to stay the federal action until final adjudication of the remanded state action, citing the presence of the state court action involving the same parties and issues as the sole basis for a stay [A. 238]. More specifically, Lake relied on [1] prior filing in the state court, and [2] duplication of effort with inherent waste.

R&S responded [A. 250] by demonstrating that the state court action is *in personam* and has not proceeded any further than the federal action. The status of the state action is the same as the federal action [A. 256, 257]. Procedurally speaking, both cases have progressed equally far and are in the early discovery stage.

R&S asserted below that it was entitled to a federal forum under Article III, §2 of the United States Constitution and 28 U.S.C. §1332. Its position was that the United States District Court, having diversity jurisdiction, was under a Congressionally and Constitutionally imposed duty to proceed. *Thermitron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976); *Moses H. Cone Hospital* v. *Mercury Const.,* ____ U. S. ____, 103 S. Ct. ____, 74 L. Ed. 2d 765 (1983).

More specifically R&S pointed out that

[1] Both actions were at the same (early discovery) stage.

[2] The state court action was *in personam,* with no *res* involved.

[3] No federal-state relations requiring abstention were involved.

[4] No reasons of wise judicial administration existed to prefer the state forum over the federal forum.

[5] Retreat by the federal judiciary was unwarranted [A. 250-267].

By order entered July 15, 1983, the federal action was "stayed pending the final adjudication of the aforementioned state court action" [A. 294]. R&S, deprived of a federal forum, appeals (such orders expressly held to be appealable in *Moses H. Cone Hospital*). The stay order appealed from reads:

> The defendant has moved the Court to dismiss or stay this action pending resolution of an action involving the same issues and the same parties, *et al.*, in Letcher Circuit Court (Civil Action No. 82-CI-414). The Court has considered the parties' responses and replies to responses to defendant's motion herein and is of the opinion that no good cause has been shown to justify litigating these same issues simultaneously in two different judicial systems. The Court being so advised,
>
> It Is Hereby Ordered, that in the interest of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal litigation, this action is now Stayed pending the final adjudication of the aforementioned state action in Letcher Circuit Court [A. 294].

THE CLEAR ERROR

The clear error of the District Court was in refusing to exercise the "virtually unflagging obligation" to proceed as spelled out in *Moses H. Cone Hospital, supra.*

Everyone agrees no state-federal relations are involved. No reasons for abstention exist. The record discloses two actions, one state and one federal, involving the same

parties and the same claims at the same stage in the respective proceedings. The District Court had before it the classic concurrent jurisdiction issue. The Supreme Court pointed out in *Moses H. Cone Hospital, supra,* and in *Colorado River Water Conservation District* v. *United States,* 424 U. S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), that stay of a federal action for reasons of wise judicial administration will be warranted only when clearly justified. With no justifying circumstances here, the stay was clear error.

The stay order shows the District Court imposed on R&S the burden of justifying "litigating these same issues simultaneously in two different judicial systems." The District Court held that "no good cause has been shown to justify" concurrent jurisdiction, and stayed the federal action.

We assert clear error in requiring R&S, having a right to a federal forum, to justify its exercise of that right. Instead, the heavy burden of showing that wise judicial administration required deprival of that right was on Lake. No showing was made. The order staying was tantamount to dismissal, was appealable and was clear error. *Moses H. Cone Hospital, supra.*

The appalling thing is that a litigant can file an action in his state court against a non-resident, join as defendants to prevent removal one or more local citizens who shouldn't be parties and deprive a citizen of another state of his federal forum by obtaining a stay when a parallel federal action is commenced. This is wrong, was condemned as wrong in *Moses H. Cone Hospital,* and the order appealed from is therefore clear error. It should be summarily vacated.

THE NEED FOR A FEDERAL FORUM

Letcher County, where the state action is pending, is an Eastern Kentucky mountain county with a population of 22,590. It is a separate state judicial district. The sole industry is coal mining and Lake is one of the largest operators in the county. Unemployment is high, about 27%, among the highest in the state. Lake, its officials, employees and attorneys wield a heavy financial and political influence in the community. The litigation tactics here were controved to confine the trial to Letcher County where R&S will be subject to the local prejudice in favor of a local industry upon which the local economy and the citizens are totally dependent. Until now, these tactics have been successful.

The Constitution and the Congress, by providing for diversity jurisdiction, did not intend the right to a federal forum to be so easily evaded. The basis for diversity jurisdiction is thus explained by Professor Moore:

> It is the generally accepted view that diversity jurisdiction was established to provide access to a competent and impartial tribunal, free from local prejudice or influence, for the determination of controversies between citizens of different states. While actual instances of state court prejudice may have been difficult to prove,
>
> It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim.

Chief Justice Marshall aptly commented that:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

1 Moore's Federal Practice, §0.71(3), p. 701.20.

These considerations are particularly important to a Chicago manufacturer who contracts to perform work in Letcher County, Kentucky. From the beginning, diversity jurisdiction has been an important cog in the development of the nation through the conduct of business in the various states.

> Whether or not fully anticipated by the Founders, this fostering of investment in the emergent nation was one of the most salutory effects ascribed to diversity jurisdiction. As former President and Chief Justice Taft has stated,
>
> The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for the promotion of enterprises and industrial and commercial progress.

1 Moore's Federal Practice, §0.71(3), p. 701.23.

And so here, R&S seeks diversity jurisdiction to protect its interest in this interstate endeavor from the local

prejudices it will certainly encounter in Letcher Circuit Court.

THE URGENCY

When Judge Unthank's order was entered, the state and federal cases were even procedurally. The stay in federal court enables the state court to proceed to judgment while this appeal is pending. Unless expedited, R&S will be deprived of not only a federal forum but also the right of meaningful appeal. The practical effect of the stay is forcefully stated in *Moses H. Cone Hospital,* at 74 L. Ed. 2d 776:

> Hence, a stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be *res judicata.* Thus, here, even more surely than in Idlewild, Mercury was 'effectively out of court.' Hence, as the Court of Appeals held, this stay order amounts to a dismissal of the suit.

The immediate problem of R&S is that the time consumed by the pendency of this appeal, with the stay in effect, will be fatal, even if this Court reverses one or two years hence. Delay in this Court will certainly deprive R&S of a federal forum.

THE REMEDY

Rule 9(d)(4) of this Court contemplates summary reversal where the error is clear. The error here is clear. The Rule should be applied here.

The right of R&S to a federal forum is clear, or sufficiently so that the status quo of the state and federal proceedings should be maintained pending this appeal. If

there is any reason not to grant summary reversal, the stay below should be vacated pending this appeal, so the federal action will not fall fatally behind the progress of the state action. An order of this nature is authorized by Rule 9(d)(4) and is inherent in this Court's power to protect its appellate jurisdiction. *McClellan* v. *Garland,* 217 U. S. 268, 30 S. Ct. 501, 54 L. Ed. 762 (1910).

There may be other remedies. Perhaps a status quo order during appeal directed to the parties would be more appropriate. After all, the problem was created by Lake's unwarranted motion; so, it should not be heard to complain of status quo until the problem is solved.

We urge this Court to fashion an order which will make this a meaningful appeal, placing R&S in as good position as it was in should this Court reverse.

CONCLUSION

The briefs and appendix will be filed by the time this motion is heard. If it appears R&S has or may have any right to a federal forum, this Court must either reverse summarily with direction to proceed forthwith or preserve the status quo until this Court can act. Here an appeal delayed is justice denied.

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Case No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee*

RESPONSE TO APPELLANT'S MOTION FOR SUMMARY REVERSAL, OR FOR ADVANCEMENT

Filed September 19, 1983

Comes the appellee, Lake Coal Company, Inc., (Lake), and for its response to the appellant's Motion For Summary Reversal, or For Advancement, states that the Court should overrule and deny the appellant's motion because the district court's order in staying the federal action was a proper exercise of its judicial discretion, and no clear error was committed. Moreover, the appellant's actions demonstrate that there is no reason for this Court to expediate the appeal of this matter. In support of its response, the appellee relies on its memorandum set forth before.

STATEMENT OF FACTS

On September 14, 1981, the parties herein entered into a written contract for Roberts & Schaefer Company (R & S) to construct a coal washing plant for Lake in Letcher County, Kentucky. Prior to the date of contract, construction was begun on the facility by Langley & Morgan Corporation and/or Darby Construction Company,

wholly owned domestic subsidiaries of Elgin National Industries, Inc., the parent corporation of R & S. The facility was to be completed no later than April 1, 1982. However, due to the negligence on the part of Elgin National Industries, Inc. and R & S in the design of the facility and the negligence, concealment, misrepresentation or breach of duties and contract on the part of Langley & Morgan Corporation and/or Darby Construction Company, R & S and Elgin National Industries, Inc., in the construction and installation of the facility, it failed to operate, initially due to cracking and total loss of water from the large concrete static thickener for clarifying the plant water. In fact, as of this date, the facility will not operate as designed.

On November 12, 1982, Lake filed its complaint in the Letcher Circuit Court against R & S, Elgin National Industries, Inc., Langley & Morgan Corporation and Darby Construction Company, for breach of contract, negligent design, construction and installation of the facility, misrepresentation, concealment and fraud, and breach of express and implied warranties. On December 1, 1982, R & S and Elgin National Industries, Inc., filed a Petition For Removal with the United States District Court for the Eastern District of Kentucky, and the action was docketed. On December 3, 1982, R & S filed its separate answer and counterclaim in the removed action. Lake filed its reply to this counterclaim on December 23, 1982. On February 15, 1982, upon motion of Lake, the district court entered an order finding that it lacked jurisdiction to try the matter, pursuant to 28 U. S. Code §1332(a)(1)(c) and remanded the action to the Letcher Circuit Court.

Having failed in its efforts to remove this action to federal court, R & S filed a complaint in the United States District Court for the Eastern District of Kentucky. [A., p. 3]. R & S's complaint involved the same parties, de-

manded the same remedies and restated the same question presented in its counterclaim in the state court. Accompanying the complaint, R & S filed interrogatories and a request for production of documents. [A., pp. 177, 209]. These discovery documents were also filed in the state court action.

On April 29, 1983, Lake filed a motion to dismiss or stay the federal action pending adjudication of the action in the state court. [A., p. 238]. In its memorandum filed with this motion and subsequent replies filed in the district court, Lake demonstrated that the action should be dismissed or stayed pursuant to the Supreme Court's rulings in *Brillhart* v. *Excess Insurance Company,* 316 U. S. 486 (1942), *Colorado River Water Conservation* v. *United States,* 424 U. S. 800 (1976), *Will* v. *Calvert Fire Insurance Company,* 437 U. S. 660 (1978), and *Moses H. Cone Hospital* v. *Mercury Construction,* ____ U. S. ____ 74 L. Ed. 2d 765 (1983). [A., pp. 243, 271, 284]. Specifically, the appellee set forth the following factors which weighed against the district court's exercise of its jurisdiction:

1) The action was filed in the state court in excess of four months prior to the filing of the federal action.

2) The federal forum was less convenient than the state forum.

3) Deference to the state action avoided a piecemeal resolution of the issues because all the parties before the state court were not before the federal court.

4) There was no issue of federal law or federal policy in the action, which required the particular expertise of the federal court. Rather, this was an action based upon diversity jurisdiction which required the district court to apply state law in the resolution of all substantive issues.

5) The state proceeding was adequate to protect the rights of R & S.

6) It was uneconomical as well as vexatious for the district court to proceed where the same issues, not governed by federal law, between the same parties were concurrently presented in a state court.

In response R & S argued, as it does before this court, that it had an absolute right to a federal forum for its cause of action. [A., pp. 254, 282, 289]. After much briefing by both parties, on July 15, 1983, the district court entered an order noting that the interests of fairness to all parties concerned, the avoidance of multiplicity of judicial time and effort, and the avoidance of piecemeal litigation weighed against exercise of its jurisdiction. Accordingly, it stayed the federal action pending final adjudication of the state action. [A., p. 294]. R & S now appeals this order. [A., p. 295].

ARGUMENT

Contrary to the appellant's assertions, 28 U.S.C. §1332 grants only "a statutory *privilege* of access to a federal court *which is not absolute.*" *P. Biersdorf & Company, Inc.* v. *Duke Laboratories,* 92 F. Supp. 287 (S. D. N. Y. 1950). (emphasis added). While it is settled that the pendency of an action in the state court alone is no bar to proceedings concerning the same matter in the federal court having jurisdiction, it is equally well settled that a district court is "under no compulsion to exercise that jurisdiction." *Brillhart* v. *Exess Insurance Company,* 316 U. S. 491 (1942). The district court has the power to dismiss or stay proceedings pending adjudication of a concurrent action in state court as an exercise of its inherent power to control the disposition of the cases on its docket.

Landis v. *North American Company,* 399 U. S. 248 (1936). Although this power is usually exercised under the abstention doctrine, the district court may also exercise this inherent power when considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation so require." *Colorado River Water Conservation District* v. *United States, supra.* The Supreme Court in three recent decisions, has set out factors to be considered by the district court in determining whether a dismissal or a stay of the federal action in deference to a state action is proper. Those factors are: 1) the forum in which the action was first filed; 2) the inconvenience of the federal forum; 3) whether either court has assumed jurisdiction over the res; 4) avoidance of piecemeal litigation; 5) whether issues of federal law or policy are present; and 6) whether the state court is adequate to protect the rights of the parties in the federal action. See, *Colorado River Water Conservation District* v. *United States, supra, Will* v. *Calvert Fire Insurance Company, supra, Moses H. Cone Hospital* v. *Mercury Construction, supra.* The decision whether to dismiss a federal action in deference to a state action does not rest on a mechanical checklist. Rather, in the last analysis, it is a matter committed to the district court's discretion. In *Will* v. *Calvert Fire Insurance Company, supra,* the court stated:

> "There are sound reasons for our reiteration of the rule that a district court's decision to defer proceedings because of concurrent state litigation is generally committed to the discretion of that court. No one can seriously contend that a busy federal trial judge, confront both with competing demands on his time for matters properly within his jurisdiction and with inevitable scheduling difficulties because of the unavailability of lawyers, parties and witnesses, is not entrusted with a wide latitude in setting his own calendar." at 665.

The order entered by the district court defering to the state court action was proper. As the record demonstrates, the court had before it several briefs from both parties which discussed at length the recent Supreme Court rulings in *Colorado River Water Conservation District* v. *United States, supra, Will* v. *Calvert Fire Insurance Company, supra, Moses H. Cone Hospital* v. *Mercury Construction, supra.* It is obvious to everyone that the court examined the factors weighing against exercise of federal jurisdiction under the guidelines of the recent Supreme Court decisions and entered its order accordingly.

The only clear error which is demonstrated in the record is in the reasoning of the appellant. In this Court, as in the district court, the appellant seizes upon what the Supreme Court says but ignores what the Supreme Court does. Although the Court in *Colorado River Water Conservation District* v. *United States, supra,* stated it had an "unflagging obligation" to exercise jurisdiction, it upheld the decision of the district court *to dismiss* the federal action in deference to the state action. The appellant makes the same error in its analysis of *Colorado River Water Conservation District* v. *United States, supra,* herein that the Court of Appeals made in *Will* v. *Calvert Fire Insurance Company, supra.* Therein the Court of Appeals, based upon the language of the court in *Colorado River Water Conservation District* v. *United States, supra,* as aforestated, entered a writ of mandamus directing the district judge to proceed immediately with the federal action after he had entered an order defering to the state action.

On certiorari, the Supreme Court reversed the Court of Appeals and affirmed the district court's stay. Although the action before the Court of Appeals was on a request for a writ of mandamus, the Supreme Court's holding is applicable to this action on appeal as indicated by the Court in *Moses H. Cone Hospital* v. *Mercury Construction, supra.*

Only in *Moses H. Cone Hospital* v. *Mercury Construction, supra,* has the Supreme Court failed to affirm the district court's entry of an order dismissing or staying a federal action pending adjudication of the concurrent state action. However, as the court noted, the defendant therein made no showing of circumstances to justify the stay of the federal action. The appellant herein similarly represents to this court that this appellee made no showing before the district court to justify a stay of the federal action. As the record demonstrates, this is simply not true. The critical factors which the defendant in *Moses H. Cone Hospital* v. *Mercury Construction, supra,* failed to demonstrate were clearly proven by the appellee in the district court.

First, the court in *Moses H. Cone Hospital* v. *Mercury Construction, supra,* noted that there was no contention that the federal forum was any less convenient to the parties than the state forum. Herein, because of the nature of the suit, and because the distance to the situs of the federal forum is more than twice the distance to the situs of the state forum from the facility negligently designed, constructed and installed by the appellant and its sibling domestic corporations, the federal forum is less convenient.

Secondly, and more importantly, the court in *Moses H. Cone Hospital* v. *Mercury Construction, supra,* found that the concurrent federal action would not cause a piecemeal

resolution of the parties underlying disputes. Because all of the parties before the state court are not present in the federal action, a piecemeal resolution of the issues raised concurrently in the federal and state actions will be required unless the district court's order is affirmed.

Thirdly, in *Moses H. Cone Hospital* v. *Mercury Construction, supra,* the court found that although the state action was first filed, the parties, in the federal action, had taken most of the steps necessary to resolve the issues therein presented whereas there was no substantive proceedings in the state action. As the appellant is quick to point out, the federal action herein had proceeded no further toward resolution than the state action at the time the stay order was entered. The appellee submits that the reason that the state action has not proceeded further was due to the actions on the part of the appellant in wrongfully removing the suit from state court. Also, this Court should note that the appellant propounded interrogatories and a request for production of documents in the federal action simultaneously with the service of its complaint so as to put itself in a posture to argue that the progress of the concurrent actions were similar. The fact is that the action was filed in state court some four months prior to the institution of the federal action and the state court should hold jurisdiction of the cause of action to the exclusion of the federal court until the state court's duty is fully performed and the jurisdiction involved is exhausted. *Callis* v. *Keystone Mutual Casualty Company,* 172 F. 2d 826 (6th Cir. 1949). See also, *Bowles* v. *Lee,* 50 F. Supp. 639 (D. C. Ky. 1945).

Fourthly, *Moses H. Cone Hospital* v. *Mercury Construction, supra,* dealt with issues of federal law and federal policy. As the court therein noted, "the presence of federal law issues must be a major consideration weighing against

surrender of the action" to the state court. There are no federal issues presented herein which require the particular expertise of the district court. Rather, this is an action based on diversity jurisdiction which requires the district court to apply state law in the resolution of all substantive issues. See, *Will* v. *Calvert Fire Insurance Company, supra.*

Lastly, the court in *Moses H. Cone Hospital* v. *Mercury Construction, supra,* found that the state proceeding was inadequate to protect the rights of the plaintifff in the federal action. The court warned that if there is any substantial doubt as to whether the concurrent state action would be an adequate vehicle for the complete and prompt resolution of the issues between the parties "it would be a serious abuse of discretion to grant the stay or dismissal at all." at 765. There is no indication that the state court litigation would be an inadequate vehicle for the complete and prompt resolution of the issues between the parties or that the appellant's rights will not be adequately protected in the state action. See, *Brendle* v. *Smith,* 46 F. Supp. 522 (S. D. N. Y. 1942). Rather, the appellee has demonstrated that the district court's deference to the state court action avoids piecemeal litigation.

It is clear that the district court's stay in deference to the state action was proper. There is nothing in the appellant's motion to indicate that the district court committed clear error or abused its discretion in entering the order staying the federal action. It is obvious that the appellant's motion is nothing more than a continuation of its efforts to disconcert and encumber the appellee with spurious motions and pleadings. Its motion should be dismissed summarily.

Likewise, there is no merit in the appellant's assertion that it needs a federal forum because of possible prejudice.

First, its statements that the appellee is one of the largest coal operators in the county and that its officials, employees and attorneys, wield a heavy financial and political influence in the community is untrue and is a total fantasy in the mind of the author of the appellant's motion. To suggest that a local attorney or businessman would wield more political influence than the former governor of this Commonwealth who was also a federal judge on the bench of the very forum the appellant now seeks is sheer nonsense. Secondly, the appellee is at a total loss in understanding the appellant's reasoning that it might incur possible prejudice in the state action because coal mining is the principle industry in Letcher County, Kentucky, the situs of the state court action. Coal mining is likewise the principle industry in the county of the situs of the federal forum. Moreover, the appellant's sibling corporations who negligently constructed and installed the facility in Letcher County, Kentucky, are domestic corporations with a principal place of business in Harlan County, Kentucky, an adjoining county, and which employed local people in its negligent construction and installation of the facility. There is no factual basis to believe that the appellant and its sibling corporations will be in any way prejudiced in the state court. Contrary to the appellant's assertions, there was no "tactic" in the appellee filing its complaint in the state court. The wrongful actions of the appellant took place in Letcher County, Kentucky, and accordingly the appellee filed its complaint in the Letcher County Circuit court.

Nor should this court vacate the stay below pending appeal as the appellant requests. Mr. Justice Frankfurter writing for the majority in *Brillhart* v. *Excess Insurance Company, supra,* stated:

> "It would be uneconomical as well as vexatious for a federal court to proceed in a suit where another suit is pending in a state court, presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." at page 295.

The remedy sought by the appellant in its motion asks this Court to continue the uneconomical and vexatious dual posture of this case pending appeal. This is nothing more than an attempt on the part of the appellant to wrongfully shift the burden of this appeal onto the appellee. Moreover, it would be burdensome to the district court. The problem from which this appeal eminates was not created by the appellee. It was the appellant which, after failing in its wrongful attempt to have the state court action removed, filed this uneconomical and vexatious concurrent action in federal court. The district court recognized this and accordingly entered its stay order. The warning of Mr. Justice Frankfurter should certainly be heeded by this Court at least until this Court has the benefit of the appellee's arguments on the merits as presented in its brief and oral argument. To do otherwise would circumvent the appellee's rights on appeal.

CONCLUSION

The record demonstrates that the stay order was the proper result of the district court's sound discretion based upon the guidelines established by the Supreme Court as aforestated. There is no error, clear or otherwise. Therefore, the appellant's motion should be dismissed.

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee*

ORDER—Filed November 3, 1983

BEFORE: JONES, KRUPANSKY and WELLFORD, Circuit Judges.

Upon consideration of the plaintiff's motion to transmit a state court record to this Court and to summarily reverse the district court's order, or, alternatively, to advance this cause for an expedited oral argument,

It is concluded that the plaintiff has failed to meet its burden of showing entitlement to transmit the record. However, the motion to advance this cause is hereby granted.

ENTERED BY ORDER OF THE COURT
John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant,*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee.*

On Appeal From the United States District Court for the Eastern District of Kentucky

Filed November 20, 1984

BEFORE: KEITH and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

CONTIE, Circuit Judge. Roberts & Schaefer Company (R&S) appeals from a district court order staying proceedings in this diversity action pending the outcome of a concurrent state court action.[1] We reverse and remand with instructions for the district court to exercise jurisdiction.

In September 1981, the parties executed a written contract under which R&S would construct a coal washing plant for Lake Coal Company, Inc. (Lake) in Letcher County, Kentucky. R&S employed two subcontractors. On

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[1]The district court's order is appealable. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, — U. S. —, 103 S. Ct. 927, 933-35 (1983).

November 12, 1982, Lake filed a complaint in state court against R&S and the subcontractors alleging breach of contract, negligent design, construction and installation, breach of warranties and fraud. R&S asserted a counterclaim for the contract price.

Although the presence of the subcontractors as parties destroyed complete diversity, R&S attempted to remove the action on the ground that the subcontractors had been joined as defendants solely for the purpose of defeating federal diversity jurisdiction. The district court disagreed with R&S and remanded the action to the state court because federal jurisdiction was absent.

R&S then filed this action against Lake, essentially pleading the counterclaim that it had filed in state court. The subcontractors were not joined. Lake answered and filed its counterclaim for breach of contract, negligence, breach of warranties and fraud. Lake then moved to dismiss or to stay this action, which now involves the same issues as the state court action. The district court stayed this action pending the outcome of the state court proceedings because "no good cause has been shown to justify litigating the same issues simultaneously in two different judicial systems" (App. at 294) and because fairness to the parties and the avoidance of multiplicitous and piecemeal litigation counseled against exercising concurrent jurisdiction.

The general rule is that the prior pendency of a state court action does not bar concurrent federal proceedings on the same matter. *See Will* v. *Calvert Fire Insurance Co.*, 437 U. S. 655, 662 (1978); *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 817 (1976). Indeed, federal courts have a "virtually unflaging obligation" to exercise their jurisdiction. *Moses H. Cone Hospital* v. *Mercury Construction Corp.*, ____ U. S. ____,

103 S. Ct. 927, 936 (1983); *Colorado River Water*, 424 U. S. at 817. Nevertheless, a district court may sometimes decline to exercise jurisdiction where a state court action on the same issues is pending. The purpose of this limited exception to the duty to exercise jurisdiction is to conserve judicial resources and to promote comprehensive disposition of litigation. *See Colorado River Water*, 424 U. S. at 817. The exception is even narrower than the abstention doctrine. *Id.*, at 818.

In deciding whether or not to exercise jurisdiction in this type of case, a district court must determine whether there exist "exceptional circumstances" that justify not doing so. *See Moses H. Cone Hospital*, 103 S. Ct. at 942. Since "only the clearest of justifications," *Id.; Colorado River Water*, 424 U. S. at 819, will warrant a stay, the burden of persuasion is upon the party seeking the stay. Moreover, the parties agree that a district court must evaluate several factors, no one of which is determinative, in reaching its decision: (1) whether the state action is an action *in rem*, (2) whether the federal and state actions have progressed to the same stage,[2] (3) whether the federal forum is convenient, (4) whether the state proceedings are adequate; (5) whether the substantive claims involve federal or state law and (6) whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed.

We hold that the district court erred in assigning the burden of persuasion. Although the burden was upon Lake to show "exceptional circumstances" amounting to the "clearest of justifications" for not exercising federal juris-

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[2]The progress of the federal and state actions is more relevant than the times of filing of the respective complaints. *See Moses H. Cone Hospital*, 103 S. Ct. at 940.

diction, the district court's order indicates that the court required R&S to show good cause why concurrent jurisdiction should be exercised. This error alone is sufficient to warrant reversal.

Furthermore, we hold that "exceptional circumstances" do not exist in this case. First, the state court action is not an action *in rem*. Second, the federal and state actions have progressed to about the same stage of discovery. Third, the federal court is only about fifty-three miles from the construction site. Fourth, both the federal and state courts appear capable of adjudicating the parties' claims and affording appropriate relief. Thus, none of the first four factors enumerated above augurs in favor of staying the federal action pending the outcome of the state proceedings.

Fifth, although both the federal and state actions involve solely questions of state law, Lake has not demonstrated either that the state law issues are so difficult or that state law is so unsettled that state court expertise is required. Accordingly, the fifth factor listed above does not constitute an exceptional circumstance justifying a refusal to exercise federal jurisdiction.

The final factor is whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed. Lake contends that piecemeal litigation will result if the federal action is not stayed because the subcontractors, whom Lake sued in state court, are not parties to the federal action. Having reviewed the arguments and the record submitted by the parties, we hold that Lake has not shown either that piecemeal litigation likely will occur if the federal action is not stayed or likely will be avoided if the federal action is stayed.

As to the former point, it is noteworthy that the subcontractors are not parties to the September 1981 contract.

Moreover, Lake has not shown that it has an arguably valid claim under Kentucky law against the non-signatory subcontractors. In short, Lake has not shown that the absence of the subcontractors in the federal action will result in Lake filing a separate action against them. Moreover, piecemeal litigation could occur in the state courts in the form of a separate action by R&S against the subcontractors if R&S is held liable to Lake for damages. Hence, piecemeal litigation may not be avoidable even if the federal action is stayed.

The judgment of the district court is REVERSED and the case is REMANDED with instructions to exercise jurisdiction.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee*

ORDER—Filed December 21, 1984

Before: KEITH and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

Lake Coal Company, Inc. has filed a petition for rehearing in the above-captioned case under Federal Rule of Appellate Procedure 40. This court considered the arguments made in the petition when making its original determination. The panel adheres to its decision entered on November 20, 1984. The petition for rehearing is DENIED.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellee,* [sic]

v.

LAKE COAL COMPANY, INC., - *Defendant-Appellant.* [sic]

ORDER—Filed January 4, 1985

Upon consideration of the appellee's motion to stay the mandate pending application for writ of certiorari,

It is ORDERED that the motion be and it hereby is granted and the mandate is stayed until February 4, 1985.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant,*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee.*

ORDER—Filed January 16, 1985

Upon consideration of the appellant's motion to reconsider this Court's order entered on January 4, 1985;

It is ORDERED that the motion be and it hereby is denied.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman
John P. Hehman, Clerk

No. 84-1240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC. - - - Petitioner,

versus

ROBERTS & SCHAEFER COMPANY - - - - - - Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a district court may stay the exercise of jurisdiction in a federal diversity action in deference to a first-filed parallel state action where the stay avoids multiplicity of judicial time, effort and piecemeal litigation, the federal action concerns only issues of state law, and the state court is an adequate forum to protect the rights of the litigants.

PARTIES BEFORE THE COURT OF APPEALS

The parties before the U. S. Court of Appeals for the Sixth Circuit were Roberts & Schaefer Company, a Delaware corporation, Plaintiff-Appellant, versus Lake Coal Company, Inc., a Kentucky corporation, Defendant-Appellee.*

*The list of the parent corporation and corporate subsidiaries and affiliates of the Petitioner, required by Rule 28.1, Rules of the Supreme Court of the United States, is set forth in the Petition For Writ of Certiorari, at p. ii.

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TABLE OF AUTHORITIES CITED

No. 84-1240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC. - - - *Petitioner,*

v.

ROBERTS & SCHAEFER COMPANY - - - - - - *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The judgment of the U. S. Court of Appeals For the Sixth Circuit in Roberts & Schaefer Company v. Lake Coal Company, Inc., is not reported. (Pet. App. B, at 1-5). The Order of the Sixth Circuit denying rehearing is not reported. (J.A. at 108). The Opinion of the District Court was not reported. (Pet. App. A, at 1).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 20, 1984. The Petition For Rehearing was denied on December 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Petition for Writ of Certiorari was docketed on January 30, 1985, and certiorari was granted on March 25, 1985.

STATEMENT OF THE CASE

On September 14, 1981, the parties herein entered into a written contract for Roberts & Schaefer Company (hereinafter R&S) to construct a closed-circuit coal washing facility for Lake Coal Company, Inc. (hereinafter Lake) in Letcher County, Kentucky. Prior to the date of contract, construction was begun on the facility by Langley & Morgan Corporation and/or Darby Construction Company, Kentucky corporations and wholly owned subsidiaries of Elgin National Industries, Inc., the parent corporation of R&S. The facility was to be completed no later than April 1, 1982. However, due to negligence on the part of R&S and Elgin National Industries, Inc., in the design of the facility, and negligence, concealment, misrepresentation and fraud, or breach of duties or contract on the part of R&S, Elgin, Langley & Morgan and/or Darby in the construction and installation of the facility, it failed to operate, initially due to cracking and total loss of water from the large concrete static thickener used for clarifying the plant water. The facility has only recently been made operational through the efforts of Lake alone.

On November 12, 1982, Lake filed its complaint in state court, Lake Coal Co., Inc. v. Roberts & Schaefer Company, Elgin National Industries, Inc., Darby Construction Company and Langley & Morgan Corporation, Civil Action No. 82-CI-414, alleging alternative causes of action for: breach of contract; negligent design, construction and installation of the facility; mis-

representation, concealment and fraud; and, breach of expressed and implied warranties. On December 1, 1982, R&S and Elgin filed a petition for removal with the United States District Court for the Eastern District of Kentucky alleging that the domestic subcontractors were fraudulently joined in the state action solely to defeat federal diversity jurisdiction because Lake did not have a valid cause of action against the subcontractors under Kentucky law. The action was docketed. On December 23, 1982, Lake filed a motion to remand the removed action to state court and the issue of the validity of Lake's cause of action under Kentucky law against Darby and Langley & Morgan was exhaustively briefed and argued. On February 15, 1983, the district court found that the domestic subcontractors were not fraudulently joined and remanded the action to state court.

Having failed in its efforts to remove this action to federal court, R&S filed a complaint against Lake in the United States District Court for the Eastern District of Kentucky on April 6, 1983. In order to obtain diversity jurisdiction, the complaint omitted as parties the domestic subcontractors, Langley & Morgan and Darby. The complaint, a duplication of R&S's counterclaim in the state court action, was filed as a defensive tactic to encumber Lake with duplicative litigation and to disrupt the litigation proceedings in the state court.

On April 29, 1983, Lake filed a motion to dismiss or stay the federal action. In the numerous briefs filed in support of its motion and in reply to the re-

sponses of R&S, Lake, recognizing that it had the burden or persuasion on the motion, set out the exceptional circumstances which counselled against exercise of federal jurisdiction. The application of the balancing test in *Colorado River Water Conservation District* v. *United States,* 424 U. S. 800 (1976), and this Court's rulings in *Brillhart* v. *Excess Insurance Company,* 316 U.S. 491 (1942), *Will* v. *Calvert Fire Insurance Company,* 437 U. S. 655 (1978), and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation,* 460 U. S. 1 (1983), were exhaustively briefed and argued.

On July 15, 1983, the district court entered its order stating:

> "in the interest of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal [sic] litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court." (Pet. App. A, at 1).

The district court's order was appealed to the Court of Appeals for the Sixth Circuit by R&S. After docketing, R&S filed a motion for summary reversal, arguing that the district court had abused its discretion in allocating the burden of persuasion on the motion to R&S. (J.A., at 81). On November 3, 1983, this motion was denied.[1] However, after briefing and oral

[1]Jones, Krupansky and Wellford, Circuit Judges, comprised the panel.

arguments by the parties, on November 20, 1983, the Court of Appeals entered its judgment finding that the district court had in fact erred in allocating the burden of persuasion requiring "R&S to show good cause why concurrent jurisdiction should be exercised" and that "exceptional circumstances" counselling against exercise of federal jurisdiction do not exist in this case. (Pet. App. B, at 3-4). Additionally, the Court of Appeals found that the stay did not avoid piecemeal litigation because Lake failed to show "that it had an arguably valid claim under Kentucky law against the non-signatory subcontractors." (Pet. App. B, at 4). The appellate court therefore, reversed and remanded the action to the district court with directions to exercise jurisdiction.[2]

On December 21, 1984, a timely petition for rehearing was denied. (J.A., at 108). However, on January 4, 1984, upon motion of Lake, the Court of Appeals entered an order staying its mandate for thirty (30) days pending application for writ of certiorari to the Supreme Court. (Pet. App. C, at 1).

On January 30, 1985, Lake filed its petition for writ of certiorari in this Court. On March 7, 1985, R&S filed a motion to dissolve stay of issuance of mandate with the Circuit Justice. However, the motion was denied. The petition for writ of certiorari was granted on March 25, 1985.

[2]Keith, Contie, Circuit Judges, and Peck, Senior Circuit Judge, comprised the panel.

SUMMARY OF ARGUMENT

The district courts have inherent discretionary power to stay proceedings. In *Colorado River Water Conservation District* v. *United States, supra,* this Court held that a district court, in exercise of this power, may dismiss a federal action in deference to a parallel state action where wise judicial administration, giving regard to conservation of judicial resources and comprehensive litigation, so required. In applying this "balancing test" the district court properly held that exceptional circumstances existed herein which counselled against exercise of federal jurisdiction. Specifically, the district court stated that the stay was entered in fairness to all parties and to avoid multiplicity of judicial time and effort and piecemeal litigation. In addition to the reasons stated by the court, deference to the state action was appropriate because state law provided the rule of decision on the merits, there was *no* federal policy regarding the specific case which required exercise of jurisdiction, the state court was an adequate vehicle to protect the rights of the litigants and the state action was first filed and has now progressed further than the federal action.

In reversing the stay, the Sixth Circuit overlooked the specific basis for the district court's stay order, and substituted its judgment for that of the district court. The decision of the Sixth Circuit overrides the discretion of the district court as recognized by this Court in *Colorado River Water Conservation District* v. *United States, supra, Brillhart* v. *Excess Insurance Company,*

supra, Will v. *Calvert Fire Insurance Company, supra,* and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra,* and impairs the efficient implementation of judicial resources. Moreover, it requires a piecemeal adjudication of the issues raised in the federal and state court actions, contrary to this Court's holding in *Colorado River Conservation District* v. *United States, supra.*

Therefore, the opinion of the appellate court should be reversed and the district court's stay order reinstated.

ARGUMENT

The District Court, Through Its Inherent Power to Control Its Own Docket, May Dismiss or Stay Exercise of Jurisdiction in Deference to a Concurrent State Action Where Exceptional Circumstances Exist.

Diversity jurisdiction is not an absolute right. 28 U.S.C. §1332 grants only a statutory privilege of access to a federal court. *Brillhart* v. *Excess Insurance Company, supra.* Although the Supreme Court has stated that a district court, with proper subject matter jurisdiction, has a "virtually unflagging obligation" to exercise jurisdiction, it has nonetheless recognized that under the proper circumstances a district court, through its inherent power, may stay or dismiss proceedings pending adjudication of a concurrent action in state court. *Landis* v. *North American Company,* 299 U.S. 248 (1936). Recent Supreme Court decisions have held that exercise of this inherent power is not only proper under the abstention doctrine, but may also be properly exercised when considerations of "wise judicial administration giving regard to conser-

vation of judicial resources"[3] and comprehensive litigation so require. *Colorado River Water Conservation District* v. *United States, supra.*

Rather than prescribe a hard and fast rule to govern the district court, the Supreme Court has enumerated factors counselling against exercise of jurisdiction, which are to be balanced against the obligation to exercise jurisdiction: inconvenience of the federal forum, desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums. Id. at 1818. In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp., supra,* this Court added two additional factors to be considered: the forum which provides the rule of decision on the merits, and, whether the state court proceedings are inadequate to protect the litigants' rights. Id. at 15-29. The balancing of these factors has been left to the broad discretion of the district court. In *Will* v. *Calvert Fire Insurance Company, supra,* at 665, Mr. Justice Rheinquist's, plurality opinion stated:

> "there are sound reasons for our reiteration of the rule that a district court's decision to defer proceedings because of concurrent state litigation is generally committed to the discretion of the Court. No one can seriously contend that a busy federal

[3]The Seventh Circuit Court of Appeals has recently stated that although the pendency of an action in state court alone is not a bar to a concurrent federal action, such parellel actions may lead to a "grand waste of effort by both the courts and the parties." *Illinois Bell Telephone Company* v. *Illinois Com'n,* 740 F. 2d 566 (7th Cir. 1984); *Microsoftware Computer Systems* v. *Ontel Corp.,* 686 F. 2d 531 (7th Cir. 1982).

> trial judge, confronted both with competing demands on his time for matters properly within the jurisdiction and with inevitable scheduling difficulties because of the unavailability of lawyers, parties and witnesses, is not entrusted with a wide latitude in setting his own calendar."

Factors Counselling Against Exercise of Jurisdiction

There are four factors present in the case at bar which, when balanced against the district court's obligation to exercise jurisdiction, counsel against exercise of jurisdiction, as correctly held by the district court below: 1) avoidance of piecemeal litigation; 2) state law provides the rule of decision on the merits; 3) the state court is adequate to protect the rights of the litigants; and, 4) priority of filing.

Avoidance of Piecemeal Litigation

In the present case, all of the parties in the federal action are included in the state action; some parties included in the state action, however, are omitted in the federal action. Likewise, the issues in the state action are broader and more inclusive than those in the federal action and the allegations in the federal action are included in the issues presented for adjudication in the state action. The district court, correctly applying the balancing test set out in *Colorado River Water Conservation District* v. *United States, supra,* recognized that the presence of these factors counselled against exercise of jurisdiction and therefore held that in fairness to all parties and to avoid piecemeal litigation and duplicative judicial time and effort the federal action should be stayed.

However, the United States Court of Appeals speculated that piecemeal litigation might not be avoided by the stay of federal jurisdiction because R&S could file a separate action in the state courts against the subcontractors if held liable to Lake for damages. Also, the Court found that Lake had not shown that it had an arguably valid claim under Kentucky law against the subcontractors in the state action.

Lake respectfully contends that the appellate court, in so finding, overlooked the fact that the state action was more inclusive of parties and issues than the federal action because of its preoccupation with an imagined possible future action by R&S against the domestic subcontractors, its sibling corporations. Imaginary cases do not affect the actual circumstances that piecemeal litigation is avoided in the instant case by stay of the federal suit. Moreover, it is most doubtful that R&S would file an action against its sibling corporations in state court, even if it is held liable to Lake for damages. That point is borne out by the fact that R&S has filed no cross-claim against its sibling corporations, co-defendants, in the state action.

If the federal action is not stayed and even if judgment is entered, it is fact, not speculation, that the parallel state action will nevertheless proceed against the subcontractors, Darby Construction Company and Langley & Morgan Corporation, and the parent corporation, Elgin National Industries, Inc., upon the same facts and law as in the instant case thereby requiring duplicative judicial time and resources. This is precisely the piecemeal litigation held proper for avoid-

ance by *Colorado River Water Conservation District* v. *United States, supra,* wherein this Court reversed the Seventh Circuit Court of Appeals and affirmed the district court's dismissal of the federal suit. Citing *Brillhart* v. *Excess Insurance Company, supra,* this Court held that the desirability of avoiding piecemeal litigation was an exceptional circumstance counselling against exercise of jurisdiction. The Court stated:

> "This policy is akin to that under lying the rule requiring that jurisdiction be yielded to the Court first acquiring control of property for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property." 424 U. S. 819.

Again, in *Arizona* v. *San Carlos Apache Tribe of Arizona,* — U. S. —, 103 S. Ct. 3201 (1984), the Court held that the conservation of state and federal judicial resources was an important factor counselling against exercise of federal jurisdiction.[4] Additionally, the Court therein warned:

> "since a judgment by either court would ordinarily be res judicata in the other, the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first — a race . . . prejudicial, to say the

[4]Moreover, this Court has repeatedly frowned upon the procedural ploy of reactive litigation. See, *Will* v. *Calvert Fire Insurance Company, supra; Brillhart* v. *Excess Insurance Company, supra.*

least, to the possibility of reasoned decisionmaking by either forum." 103 S. Ct. at 3214.

In the present action, a determination of issues involving the design, installation and construction of the wash plant facility will be required in both the federal and state courts unless the federal action is stayed because the state action is more inclusive in parties thereto and issues therein. A judgment in the federal action resolves only one facet of the dispute leaving the remaining issues for adjudication by the state court. Lake respectfully contends that the stay of the federal action not only avoids such piecemeal adjudication of this case and thereby conserves state and federal judicial resources, but it, additionally, heeds this Court's warning in *Arizona* v. *San Carlos Apache Tribe of Arizona, supra,* and prevents a "destructive race" to judgment.

In *Reiter* v. *Universal Marion Corporation,* 173 F. Supp. 13 (D.C. 1959), a stockholder derivative action, the court stayed federal jurisdiction holding that piecemeal litigation of underlying disputes would result unless the concurrent federal action was stayed because all of the parties in the state court action were not before the federal court. Similarly, in *Brendle* v. *Smith,* 46 F. Supp. 522 (S.D. N.Y. 1942), the court stayed federal jurisdiction holding that piecemeal litigation would result unless the federal action were stayed because the state action was broader and more inclusive in regard to the parties thereto and the issues

therein. In *P.P.G. Industries, Inc.* v. *Continental Oil Company,* 478 F. 2d 674, 683 (5th Cir. 1973), the Fifth Circuit Court of Appeals faced with the very issue presented herein, stayed the federal action stating:

> "The advantages of obtaining in one suit or the other joinder of more parties affected by the controversy, even though they are not indispensible parties to the litigation, may be decisive in a given case."

In the case at bar, the stay of the federal action permits all issues arising out of the design, installation and construction of the wash plant facility to be determined between all parties in one action and thereby avoids piecemeal litigation and duplicative judicial time and effort. These exceptional circumstances counsel against exercise of jurisdiction.

The Court of Appeals failed to reach this conclusion because it misconceived that it was to determine whether Lake had a valid cause of action against the subcontractors in the state suit. In the first instance, the validity of Lake's claim under Kentucky law was not an issue presented on appeal to the Sixth Circuit. The issue presented for appeal was whether the district court had abused its discretion in granting the stay, not the merits of Lake's case in state court. There was no claim raised by R&S on appeal that Lake did not have an arguably valid claim against the subcontractors in the state action. Nor was there any discussion by any party of the relevant facts or applicable law whereby the appellate court could make a reasoned

determination of this issue.[5] Moreover, the Court of Appeals apparently overlooked the fact that the issue of the validity of Lake's cause of action against the subcontractors in the state claim was presented, exhaustively briefed, argued and decided by the district court in a separate removal action on motion to remand. The district court, in finding that the subcontractors were not fraudulently joined in the state action, necessarily determined that Lake had an arguably valid claim against them in the state court suit.

State Law Provides the Rule of Decision

The present federal action, based on diversity jurisdiction, concerns only application of state law and there is no federal policy regarding the specific case requiring exercise or stay of federal jurisdiction present. This factor also counsels against exercise of jurisdiction. In *Colorado River Water Conservation District* v. *United States, supra,* and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra,* the

[5]In its petition for reconsideration Lake cited, without discussion, the cases, briefed and argued to the district court, which demonstrate the validity of its claim against the subcontractors for negligence, concealment, misrepresentation and fraud and the status of Lake as an intended third party beneficiary of the contract between the subcontractors and R&S. The appellate court apparently overlooked these cases because of its preoccupation with the fact that the subcontractors were non-signatory to the September, 1981, contract between Lake & R&S. Lake respectively submits that it is not necessary for the subcontractors to be signatory to said contract in order to have an arguably valid claim against them, in one or more of the alternative causes of action set out in its complaint.

existence of federal policy counselling against or favoring exercise of jurisdiction was the primary factor in the Court's decision.

In *Colorado River Water Conservation District* v. *United States, supra,* this Court noted that the McCarran Act expressed a federal policy favoring the determination of water rights by state courts. Accordingly, this Court affirmed the district court's dismissal of the federal action in deference to the parallel state action. See, *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company,* 460 U. S. at 23, footnote 29. Similarly, in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra,* this Court noted that the Arbitration Act expressed a federal policy requiring that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . ." 460 U. S. at 24-25. It stated that the "presence of federal-law issues must always be a major consideration weighing against surrender" of jurisdiction. *Id.* at 25. Because this Court found "that there was substantial doubt" that the construction company could obtain an order compelling arbitration in the state court, it reversed the district court's stay order and remanded the action with instructions to exercise jurisdiction thereby carrying out the federal policy promoting arbitration of disputes.

In *Tai Ping Insurance Co. LTD* v. *M/V Warschau,* 731 F. 2d 1141 (5th Cir. 1984), the Fifth Circuit Court of Appeals held that this Court's essential concern in *Moses H. Cone Memorial Hospital* v. *Mercury Con-*

struction Company, supra, was not the exercise of federal jurisdiction but rather that the intent of the federal law not to delay arbitration required exercise of jurisdiction therein. See also, *Southland Corp.* v. *Keating,* — U. S. —, 194 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

In the case at bar there are no issues of federal law, nor is there an expressed federal policy requiring exercise of jurisdiction. Lake respectfully contends that these unique factors are significant and counsel against exercise of federal jurisdiction.

Although this Court has not previously ruled on a case based on diversity jurisdiction where there is no federal policy regarding the specific case requiring exercise or stay of jurisdiction, this Court has noted the importance of these factors. In *Brillhart* v. *Excess Insurance Company, supra,* this Court stated that ordinarily it is uneconomical and vexatious to proceed with the exercise of federal jurisdiction where a concurrent action is pending in the state court and the federal action is governed by state law.[6] *Id.* at 495.

Furthermore, in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra,* the Court indicated that, although rare, the presence of state law issues may weigh in favor of the surrender of jurisdiction to the state court. *Id.* at 25. Accord, *Gilbane Building Company* v. *The Nemours Foundation,* 568 F. Supp. 1085 (D. Del. 1983).

[6]Although a declaratory judgment action, it is cited with approval in *Colorado River Water Conservation District* v. *United States, supra,* at 878, and *Will* v. *Calvert Fire Insurance Company, supra,* at 662.

Similarly, the Eleventh Circuit Court of Appeals stated that, in a federal diversity action, the presence of only state law would ordinarily "counsel deference to the state forum." *American Manufacturer's Mutual Insurance Company* v. *Edward D. Stone, Jr.,* 743 F. 2d 1519, 1524 (11th Cir. 1984).

It is not necessary for the state law to be unsettled in order for these factors to be significant, as the Sixth Circuit incorrectly held.[7] Rather, it is apparent that it is the state court's greater familiarity and greater expertise with state law in all instances which counsels against exercise of jurisdiction. See, *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra.*[8] Lake therefore, respectfully contends that this factor weighs in favor of the stay of the federal action.

State Court Is an Adequate Vehicle

Since the federal action is based on diversity jurisdiction and Kenutcky law must be applied, it is apparent that the state courts of Kentucky afford an

[7]If the state law was unsettled, then the stay would have been appropriate under the doctrine of abstention. *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25 (1959). See also, *Colorado River Water Conservtion District* v. *United States, supra,* at 814-815.

[8]Therein, this Court noted that the federal policy favoring determination of water rights by state courts was due in part to Congress' judgment that "the field of water rights is one peculiarly appropriate for comprehensive treatment *in the forum having the greatest expertise assisted by state administrative officers acting under state courts.* (emphasis added). 460 U. S. at 20.

adequate forum for this action. In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra,* the Court found that the state action was inadequate to protect the rights of the plaintiff because the decisions in prior state supreme court cases raised a reasonable doubt that the state court would enter an order compelling the plaintiff to arbitrate, which was a primary remedy sought by the plaintiff in the federal action. Unlike *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra,* there are no remedies available to R&S in the federal action which are not also available in the state action.

Priority of Filing

The state action was filed in November, 1982, some five months prior to the filing of the federal action. Its priority in filing counsels against exercise of jurisdiction under the circumstances herein. See, *Colorado River Water Conservation District* v. *United States, supra.* Certainly, the Petitioner does not suggest that this Court give too mechanical a reading to the chronology of filing. This Court plainly held that priority should not be measured exclusively by which complaint was filed first but rather in terms of how much progress has been made in the two actions. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company, supra.* At the time the stay order was entered in the district court, the first-filed state action had proceeded no further toward resolution than the federal

action due primarily to R&S's actions in attempting to wrongfully remove the suit from state court.[9]

However, since that time the state action has progressed in its natural course so that discovery is near completion and the trial of the matter is scheduled for September 2, 1985. The Seventh and Ninth Circuits have held that if "the progress of the state suit has changed significantly . . . it would defeat that purpose . . . [of the *Colorado River* doctrine] . . . to ignore the subsequent events," *Illinois Bell Telephone Company* v. *Illinois Commerce Com'n, supra,* at 570; *United States* v. *Adair,* 723 F. 2d 1394 (9th Cir. 1983), cert. denied, — U. S. —, 104 S. Ct. 3536 (1984). Therefore, the chronological order of filing and the further progress of the state action certainly counsels against exercise of jurisdiction herein.

The Sixth Circuit Opinion

The Sixth Circuit held:

> "the district court's order indicates that the court required R&S to show good cause why concurrent jurisdiction should be exercised. This error alone is sufficient to warrant reversal."

Lake respectfully contends that the Sixth Circuit overlooked the specific language of the district court's stay

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[9]Moreover, the Court should note that R&S propounded interrogatories and a request for production of documents in the federal action simultaneously with the service of its complaint so as to place itself in a posture to argue that the progress of the concurrent action was similar.

order which set out the court's rationale for the stay as follows:

> "It is hereby ordered, that in the interest of fairness to all concerned, as well as to avoid multiplicity of judicial time and effort, and piecemeal litigation, this action is now stayed . . . ." (Appendix p. 6a).

It is clear that the district court ruled that the avoidance of piecemeal litigation counselled against exercise of jurisdiction in this case and that no countervailing reasons requiring exercise of jurisdiction had been shown to exist by R&S. The district court's reference to fairness to all parties concerned indicates that the district court considered whether countervailing reasons existed requiring exercise of jurisdiction even after Lake demonstrated that exceptional circumstances, counselling against exercise of jurisdiction, existed.

The Court of Appeals ignored the district court's rationale and seized upon the language in the order which did not pertain to the allocation of the burden of proof.[10] The district court's statement, upon which the appellate court based its finding, is similar to that employed by the Fifth Circuit in *P.P.G. Industries, Inc.* v. *Continental Oil Company, supra,* at 6. Therein, the Court, after concluding that exceptional circumstances counselling against exercise of jurisdiction, existed, further stated:

[10]The district court also stated "no good cause has been shown to justify litigating these same issues simultaneously in two different judicial systems." [Pet. App. A at (1)]

> "nothing has come to the attention of this Court, which would indicate a stay would be unfair to P.P.G." Id. at 683.

Similarly, in *Calvert Fire Insurance Company* v. *American Mutual Reinsurance Company,* 600 F. 2d 1228 (7th Cir. 1979), the court stated:

> "Preventing a vexatious suit is similar to the interest in avoiding piecemeal litigation mentioned in *Colorado River, supra,* at 818, and would clearly justify federal deferral to the parallel state proceeding *unless there exists strong countervailing reasons* for the federal court to decide the federal suit without further delay such as prejudice to Calvert of compelling policy reasons to secure an immediate federal court decision." (emphasis added). Id. at 1234.

Even in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp., supra,* this Court noted that not only had the hospital failed to demonstrate the existence of exceptional circumstances counselling against exercise of jurisdiction, but that the construction company had also shown countervailing factors indicating that federal jurisdiction should be exercised without delay.

In the case at bar, R&S raised no indication that countervailing factors exist requiring exercise of jurisdiction without delay even though Lake had demonstrated that exceptional circumstances which counselled against that exercise did exist. Instead, R&S only argued that it had an absolute right to a federal forum.

The record demonstrates that the district court assigned the burden or persuasion to Lake. It properly applied the "balancing test" in *Colorado River Water Conservation District* v. *United States, supra,* and, in its discretion, concluded that "in the interest of fairness to all parties concerned as well as to avoid multiplicity of judicial time and effort and piecemeal litigation" the federal action should be stayed.

CONCLUSION

Over the past few years there has been a dramatic increase in the number of diversity cases filed with the United States district courts. See, *1981 Anuual Report of the Director of the Administrative Office of the United States Courts,* at 4. Perhaps recognizing this, the Court in *Colorado River Water Conservation District* v. *United States, supra,* held that federal actions may be dismissed in deference to parallel state actions when considerations of conservation of judicial resources and comprehensive litigation so require. The United States District Court for the Eastern District of Kentucky stayed the federal action herein in compliance with the *Colorado River* doctrine. The Sixth Circuit Court of Appeals' decision thwarts that doctrine and therefore, should not be permitted to stand. For the foregoing reasons, Lake prays that the judgment of the Sixth Circuit be reversed and the district court's order of stay be reinstated.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 83-119

ROBERTS & SCHAEFER COMPANY, - - - *Plaintiff*,

v.

LAKE COAL COMPANY, INC., - - - *Defendant*.

ORDER—Filed July 15, 1983

The defendant has moved the Court to dismiss or stay this action pending resolution of an action involving the same issues and the same parties, et al., in Letcher Circuit Court (Civil Action No. 82-CI-414). The Court has considered the parties' responses and replies to responses to defendant's motion herein and is of the opinion that no good cause has been shown to justfy litigating these same issues simultaneously in two different judicial systems. The Court being so advised,

IT IS HEREBY ORDERED, that in the interests of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court.

This the 14th day of July, 1983.

(s) G. Wix Unthank
G. Wix Unthank, Judge

APPENDIX B

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellant,*

v.

LAKE COAL COMPANY, INC., - - *Defendant-Appellee.*

On Appeal From the United States District Court for the Eastern District of Kentucky

Filed November 20, 1984

BEFORE: KEITH and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

CONTIE, Circuit Judge. Roberts & Schaefer Company (R&S) appeals from a district court order staying proceedings in this diversity action pending the outcome of a concurrent state court action.[1] We reverse and remand with instructions for the district court to exercise jurisdiction.

In September 1981, the parties executed a written contract under which R&S would construct a coal washing plant for Lake Coal Company, Inc. (Lake) in Letcher County, Kentucky. R&S employed two subcontractors. On

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[1]The district court's order is appealable. *See Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, — U. S. —, 103 S. Ct. 927, 933-35 (1983).

November 12, 1982, Lake filed a complaint in state court against R&S and the subcontractors alleging breach of contract, negligent design, construction and installation, breach of warranties and fraud. R&S asserted a counterclaim for the contract price.

Although the presence of the subcontractors as parties destroyed complete diversity, R&S attempted to remove the action on the ground that the subcontractors had been joined as defendants solely for the purpose of defeating federal diversity jurisdiction. The district court disagreed with R&S and remanded the action to the state court because federal jurisdiction was absent.

R&S then filed this action against Lake, essentially pleading the counterclaim that it had filed in state court. The subcontractors were not joined. Lake answered and filed its counterclaim for breach of contract, negligence, breach of warranties and fraud. Lake then moved to dismiss or to stay this action, which now involves the same issues as the state court action. The district court stayed this action pending the outcome of the state court proceedings because "no good cause has been shown to justify litigating the same issues simultaneously in two different judicial systems" (App. at 294) and because fairness to the parties and the avoidance of multiplicitous and piecemeal litigation counseled against exercising concurrent jurisdiction.

The general rule is that the prior pendency of a state court action does not bar concurrent federal proceedings on the same matter. *See Will* v. *Calvert Fire Insurance Co.*, 437 U. S. 655, 662 (1978); *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 817 (1976). Indeed, federal courts have a "virtually unflaging obligation" to exercise their jurisdiction. *Moses H. Cone Hospital* v. *Mercury Construction Corp.*, ___ U. S. ___,

103 S. Ct. 927, 936 (1983); *Colorado River Water*, 424 U. S. at 817. Nevertheless, a district court may sometimes decline to exercise jurisdiction where a state court action on the same issues is pending. The purpose of this limited exception to the duty to exercise jurisdiction is to conserve judicial resources and to promote comprehensive disposition of litigation. *See Colorado River Water*, 424 U. S. at 817. The exception is even narrower than the abstention doctrine. *Id.*, at 818.

In deciding whether or not to exercise jurisdiction in this type of case, a district court must determine whether there exist "exceptional circumstances" that justify not doing so. *See Moses H. Cone Hospital*, 103 S. Ct. at 942. Since "only the clearest of justifications," *Id.*; *Colorado River Water*, 424 U. S. at 819, will warrant a stay, the burden of persuasion is upon the party seeking the stay. Moreover, the parties agree that a district court must evaluate several factors, no one of which is determinative, in reaching its decision: (1) whether the state action is an action *in rem*, (2) whether the federal and state actions have progressed to the same stage,[2] (3) whether the federal forum is convenient, (4) whether the state proceedings are adequate; (5) whether the substantive claims involve federal or state law and (6) whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed.

We hold that the district court erred in assigning the burden of persuasion. Although the burden was upon Lake to show "exceptional circumstances" amounting to the "clearest of justifications" for not exercising federal juris-

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[2]The progress of the federal and state actions is more relevant than the times of filing of the respective complaints. *See Moses H. Cone Hospital*, 103 S. Ct. at 940.

diction, the district court's order indicates that the court required R&S to show good cause why concurrent jurisdiction should be exercised. This error alone is sufficient to warrant reversal.

Furthermore, we hold that "exceptional circumstances" do not exist in this case. First, the state court action is not an action *in rem*. Second, the federal and state actions have progressed to about the same stage of discovery. Third, the federal court is only about fifty-three miles from the construction site. Fourth, both the federal and state courts appear capable of adjudicating the parties' claims and affording appropriate relief. Thus, none of the first four factors enumerated above augurs in favor of staying the federal action pending the outcome of the state proceedings.

Fifth, although both the federal and state actions involve solely questions of state law, Lake has not demonstrated either that the state law issues are so difficult or that state law is so unsettled that state court expertise is required. Accordingly, the fifth factor listed above does not constitute an exceptional circumstance justifying a refusal to exercise federal jurisdiction.

The final factor is whether piecemeal litigation will be created or avoided depending upon whether the federal action is stayed. Lake contends that piecemeal litigation will result if the federal action is not stayed because the subcontractors, whom Lake sued in state court, are not parties to the federal action. Having reviewed the arguments and the record submitted by the parties, we hold that Lake has not shown either that piecemeal litigation likely will occur if the federal action is not stayed or likely will be avoided if the federal action is stayed.

As to the former point, it is noteworthy that the subcontractors are not parties to the September 1981 contract.

Moreover, Lake has not shown that it has an arguably valid claim under Kentucky law against the non-signatory subcontractors. In short, Lake has not shown that the absence of the subcontractors in the federal action will result in Lake filing a separate action against them. Moreover, piecemeal litigation could occur in the state courts in the form of a separate action by R&S against the subcontractors if R&S is held liable to Lake for damages. Hence, piecemeal litigation may not be avoidable even if the federal action is stayed.

The judgment of the district court is REVERSED and the case is REMANDED with instructions to exercise jurisdiction.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 83-5551

ROBERTS & SCHAEFER COMPANY, - *Plaintiff-Appellee,* [sic]

v.

LAKE COAL COMPANY, INC., - *Defendant-Appellant.* [sic]

ORDER—Filed January 4, 1985

Upon consideration of the appellee's motion to stay the mandate pending application for writ of certiorari,

It is ORDERED that the motion be and it hereby is granted and the mandate is stayed until February 4, 1985.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman
John P. Hehman, Clerk

BRIEF FOR THE RESPONDENT

C. ELLIOTT COMBS
WYATT, TARRANT & COMBS
1100 Kinkead Towers
Lexington, Kentucky 40507
(606) 233-2012
Attorney for Respondent

QUESTIONS PRESENTED

1. Absent abstention, does a district court with jurisdiction have discretion to decline jurisdiction in favor of a concurrent state court proceeding even in exceptional circumstances where the congressional jurisdictional grant does not confer discretion to decline?

2. Does the lack of a federal question and the application of well-settled principles of state law in a diversity action supply exceptional circumstances, the clearest of justifications, for surrender of jurisdiction?

3. Absent abstention and exceptional circumstances, does a district court with jurisdiction have discretion to decline to proceed in deference to a concurrent state action?

* The current list of the parent corporation and corporate subsidiaries and affiliates of the Respondent required by Rule 28.1, Rules of the Supreme Court of the United States, is set forth in the certificate of counsel of record dated March 6, 1985.

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TABLE OF AUTHORITIES CITED

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No. 84-1240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC. - - - *Petitioner*

v.

ROBERTS & SCHAEFER COMPANY - - *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT COURT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Respondent supplements the Petitioner's statement as follows:

The record in the state court action is not present here. The Petitioner (Lake) did not see fit to make it part of the record in seeking the stay order. But everyone agrees Lake commenced an action in the state court against Respondent (R&S) and two Kentucky subcontractors for breach of contract. The action was filed November 12, 1982, while R&S was on the ground testing and completing work on the contract.

R&S appraised the situation. It found itself a defendant in a state court in a small mountain county of Eastern Kentucky (22,590 pop.). The county's sole

industry is coal mining with 27% unemployment. It was pitted against one of the major employers in the community [J.A. 86]. As a Chicago-based corporation, R&S sought a federal forum. The subcontractors joined in the state court action were not parties to the contract [J.A. 9-18], and their presence was solely to prevent removal to federal court. R&S removed, but the district court remanded on February 15, 1983.

Lake owed R&S $1,397,615.96 on the contract. R&S felt a strong need for a federal forum. On April 6, 1983, R&S commenced this action in the United States Ditstrict Court for the Eastern District of Kentucky for the amount due under the contract asserting mechanic's and materialman's liens [J.A. 5-22].

Lake moved to dismiss or stay [J.A. 23-40]. R&S responded [J.A. 54-66]. Affidavit of counsel sets forth the comparative status of both cases at the time stay was sought [J.A. 56]. Both were at the same stage of development — early discovery. No other evidence was introduced on the stay motion.

The record clearly demonstrates (1) the state action is *in personam,* (2) the actions had progressed to the same stage (early discovery), (3) the federal forum is convenient (37 miles from the state court), (4) other than local prejudice the state proceedings are adequate, (5) the substantive claims involve well-settled questions of state law, and (6) the proceeding in the federal action neither creates nor avoids piecemeal litigation. The subcontractors could be added by Lake in the federal action by crossclaim or third-party complaint without losing jurisdiction.

The district court stayed, saying:

> ORDER—Filed July 15, 1983
>
> The defendant has moved the Court to dismiss or stay this action pending resolution of an action involving the same issues and the same parties, et al., in Letcher Circuit Court (Civil Action No. 82-CI-414). The Court has considered the parties' responses and replies to responses to defendant's motion herein and is of the opinion that no good cause has been shown to justify litigating these same issues simultaneously in two different judicial systems. The Court being so advised,
>
> IT IS HEREBY ORDERED, that in the interests of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piecemeal litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court.

[J.A. 80].

At the time of stay, Lake had filed its counterclaim in the federal action [J.A. 41-53] and R&S had filed its counterclaim in the state court action [J.A. 27-31]. The issues were the same in both courts except (1) R&S asserted a lien in federal court, and (2) Lake joined the Kentucky subcontractors as defendants in state court. Neither action was interfering with or intruding upon the conduct of the other.

The diversity jurisdiction of the United States district court under 28 U.S.C. § 1332 is not questioned. Viewing the stay as tantamount to dismissal and perceiving error, R&S appealed. The United States Court

of Appeals for the Sixth Circuit reversed [J.A. 103-107]. Petition for rehearing was denied [J.A. 108]. This Court granted certiorari.

R&S takes a dim view of the procedural disadvantage wrought upon it by the stay and the delays inherent in the appellate process. R&S filed a motion for summary reversal in the circuit court of appeals [J.A. 81-89]. R&S also objected to a stay of the mandate by the court of appeals [J.A. 109, 110] and moved in this Court for issuance of the mandate.

This action was filed over two years ago. But for the stay it would have been tried in the district court. As it now stands, the state court case is set for trial in September 1985, and a final judgment there may be *res judicata*. If this occurs, R&S will have been deprived of the federal forum granted it by the Congress.

SUMMARY OF ARGUMENT

The basis of federal judicial power is article III of the United States Constitution. Section 2, clause 1 granted Congress the power to confer diversity jurisdiction. Diversity jurisdiction was conferred in 1789. It still exists today. 28 U.S.C. § 1332. The grant is mandatory, and no discretion to decline is given. This vests a right to a federal forum in citizens so situated.

The district court, with jurisdiction, had an unflagging obligation to proceed despite concurrent state proceedings. There is no basis for abstention. There were no exceptional circumstances. In diversity cases, the absence of a federal question and the application of state law does not provide exceptional circumstances.

No basis for discretion to decline jurisdiction is present, and no discretion to decline is permitted by 28 U.S.C. § 1332.

The heavy burden of establishing a basis to decline jurisdiction was on Lake. It failed to meet that burden. The court of appeals correctly evaluated the situation and properly reversed the district court.

ARGUMENT

1. The Basis of Federal Judicial Power.

Article III of the United States Constitution is the foundation of the judicial power of our federal system. Section 1 establishes the courts thusly:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2, clause 1 gives the subjects of federal jurisprudence:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdictions; — to Contro-

> versies between two or more States; — between a State and Citizens of another State; — between citizens of different States, — between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subject.

The power created by the Constitution is not self-executing in the inferior courts. The Constitution sets forth the ambit within which the Congress may act to mandate adjudication of controversies in the inferior federal courts. *See, e.g. Cary* v. *Curtis,* 44 U. S. (3 How.) 236, 245 (1845); *Sheldon* v. *Sill,* 49 U. S. (8 How.) 441, 448-49 (1850).

The breadth of the discretion of the Congress is unlimited in determining which causes the inferior courts shall hear within the ambit of article III powers. The Congress may grant, withhold or limit jurisdiction, partially or *in toto*. *See Cary,* 44 U. S. 236; *Sheldon,* 49 U. S. 441. The Congress may confer exclusive jurisdiction on the federal courts, preempting the state courts. 18 U.S.C. § 3231; 15 U.S.C. § 78 aa; 15 U.S.C. §§ 15, 26; *e.g. Freeman* v. *Bee Mach. Co.,* 319 U. S. 448 (1943). Or the Congress may expressly grant concurrent state and federal jurisdiction. 45 U.S.C. § 56; *e.g. Miles* v. *Illinois Central R.R.,* 315 U. S. 698 (1942).

The vast majority of congressional jurisdictional grants simply impose on the federal courts the duty to entertain justiciable controversies in article III areas without expression of exclusiveness. In the absence of intent to make federal jurisdiction exclusive, the pre-

sumption is that Congress did not intend those causes to be asserted only in the federal courts. *See, e.g. Plaquemine Tropical Fruit Co.* v. *Henderson,* 170 U. S. 511 (1898); *Gulf Offshore Co.* v. *Mobile Oil Co.,* 453 U. S. 473, 477-84 (1981). The framers of the Constitution, carrying forward the federalist concept, thus established jurisdiction concurrent with the state courts.

2. Concurrent Jurisdiction

Concurrent jurisdiction has long been a judicial fact of life in our dual court system. The right and duty of the state and federal courts to hear matters within their jurisdiction is not now open to question. *See, e.g. Suydam* v. *Broadnax,* 39 U. S. (14 Pet.) 67, 75 (1840); *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 360 (1910).

The law under which the claim arises is not determinative of the court in which it must be pursued.

Justiciable controversies arising under federal law may be asserted in the state courts. *Claflin* v. *Houseman,* 93 U. S. 130, 131 (1876). Indeed, state courts are under a duty to enforce claims based upon federal law. *See, e.g. Claflin,* 92 U. S. at 137; *Mondou* v. *New York, N.H. & H. R.R. Co.,* 223 U. S. 1, 55-59 (1912); *Testa* v. *Katt,* 330 U. S. 386, 391 (1947).

Conversely, the federal courts have the firm duty to decide actions based solely on state law. *See, e.g. Kline* v. *Burke Constru. Co.,* 260 U. S. 226, 234 (1922); *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 77-78 (1938); *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336, 344 (1976).

3. Jurisdiction as an Individual Right.

Congressionally granted jurisdiction confers on the recipient citizen a personal enforceable right to a federal forum. *See, e.g. Turner* v. *Bank of North America,* 4 U. S. (4 Dall.) 8, 10 (1799); *Cary,* 44 U. S. at 245.

4. The Duty to Exercise Jurisdiction.

The courts of this nation, both state and federal, uniformly adhere to the principle that a grant of jurisdiction is a mandate to adjudicate all justiciable controversies within the jurisdictional ambit. *See* 20 Am. Jur. 2d *Courts* § 93 (1965); 21 C.J.S. *Courts* § 90 (1940).

The duty to exercise jurisdiction has been often acknowledged by this Court. *See, e.g. England* v. *Louisiana Medical Examiners,* 375 U. S. 411, 415 (1964); *Kline,* 260 U. S. at 234; *Burgess* v. *Seligman,* 107 U. S. 20, 34 (1883); *Knox County* v. *Aspinwall,* 65 U. S. (24 How.) 376, 384-85 (1861); *Bank of the United States* v. *Deveaux,* 9 U. S. (5 Cranch) 61, 87 (1809).

5. The Unflagging Obligation to Proceed.

The obligation to exercise jurisdiction is triggered by the commencement of a justiciable controversy within the jurisdiction of the federal court. Once commenced it is the duty of the court to move forward in the ordinary processes of the court with all deliberate speed until the controversy is finally adjudicated. *See, Kline,* 260 U. S. at 230.

Lake complains that proceeding here would be onerous and a duplication of judicial effort. But Mr. Justice VanDevanter observed in *Mondou:*

> The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication.

223 U. S. at 58.

Lake suggests R&S should be satisfied with a state forum. And the district court held R&S had shown "no good cause" to seek a federal forum. But R&S, facing a feud the equivalent of Hatfield - McCoy,[1] objected and appealed, relying on the words of Mr. Justice Brennan in *England:*

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

375 U. S. at 415 (quoting *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 40).

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[1]The Hatfield-McCoy feud took place in the county adjoining the state court situs. Jones, *The Hatfields & The McCoys,* The University of North Carolina Press, (1948).

The duty to proceed was firmly expressed by Mr. Justice Campbell in *Hyde* v. *Stone:*

> . . . the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.

61 U. S. (20 How.) 170, 175 (1858); *see also Thermtron,* 423 U. S. at 344.

But perhaps the most eloquent expression was by Chief Justice Marshall in *Cohens* v. *Virginia:*

> It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

19 U. S. (6 Wheat.) 264, 404 (1821).

The current authoritative pronouncement of the rule is found in *Colorado River Cons. Dist.* v. *U. S.* 424 U. S. 800 (1976). Mr. Justice Brennan, speaking for the Court, pointed out:

> Generally, as between state and federal courts, the rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction. . . ." *McClellan* v. *Carland,* [217 U. S., 268] 282, 54 L. Ed. 762, 30 St. Ct. 501 [1910]. *See Donovan* v. *City of Dallas,* 377 U. S. 408, 12 L. Ed. 2d 409, 84 St. Ct. 1579 (1964). As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation. *See Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.,* [342 U. S. 180 (1952)]; *Steelman* v. *All Continent Corp.,* 301 U. S. 278, 81 L. Ed. 1085, 57 S. Ct. 705 (1937); *Landis* v. *North American Co.,* 299 U. S. 248, 254, 81 L. Ed. 153, 57 S. Ct. 163 (1936). This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them. *England* v. *Medical Examiners,* 375 U. S. 411, 415, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964); *McClellan* v. *Carland, supra* at 281, 54 L. Ed. 762, 30 S. Ct. 501; *Cohens* v. *Virginia,* (6 Wheat.) 264, 404, 5 L. Ed. 257 (1821) (dictum). Given this obligation, and the absence of weightier consider-

> ations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist.

424 U. S. at 817-18.

This view has been quoted and decisively applied as late as 1983 in *Moses H. Cone Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 15 (1983).

6. Pullman Abstention.

We need only note that the unflagging obligation is limited, where appropriate, by the three instances of abstention enumerated in *Colorado River*. 424 U. S. at 814-16. None of the Pullman abstention elements are present here, and Lake does not assert otherwise.

7. Younger Abstention.

A fourth ground for abstention finds its source in *Younger* v. *Harris*, 401 U. S. 37 (1971). The thrust of the doctrine is that comity and the federalist structure of the judiciary will not tolerate federal judicial interference with state functions in which the state has vital concerns. The state concern in *Younger* was interference with the prosecution of a crime against the state.

Younger's progeny extended the doctrine to civil proceedings. *See, e.g. Huffman* v. *Pursue*, 420 U. S. 592 (1975); *Juidice* v. *Vail*, 430 U. S. 327 (1977); *Trainor* v. *Hernandez*, 431 U. S. 434 (1977); *Moore* v. *Simms*, 442 U. S. 415 (1979).

Younger abstention has no relevancy here. Lake apparently agrees. Here there is no paramount state interest (state criminal prosecution, protecting abused children, protecting state judicial process, etc.), and there is no federal interference or intrusion sought or suggested. In *Colorado River*, this Court held *Younger* inapplicable:

> Finally, abstention is appropriate where . . . federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings. . . . Like the two previous categories, this category does not include this case. . . . We also do not deal with an attempt to restrain such actions . . .

424 U. S. at 816; *accord Traughber* v. *Beauchane*, Nos. 84-5366, 84-5703 (6th Cir., April 22, 1985).

In the instant case, we are not dealing with an attempt to restrain, interfere with, or intrude upon the state court action; nor is there a vital state interest involved. Absent intrusion into or interference with a vital state interest, actual or attempted, abstention to maintain federalism is inappropriate. Federalism can be best maintained here by securing to R&S its right to an effective federal forum.

8. Exceptional Circumstances.

This Court noted that wise judicial administration might justify not proceeding in "exceptional circum-

stances." *Colorado River,* 424 U. S. at 818. The factors enumerated by the Court to be considered include:

(a) *The Presence of a Res* — The state action is *in personam.* R&S asserts liens only in the federal action.

(b) *The Status of the Actions* — Both proceedings were at the same early discovery stage.

(c) *Inconvenience of the Federal Forum* — The state and federal courthouses are 37 miles apart. Both are served by U. S. Highway 119.

(d) *The Adequacy of the Courts* — Both courts and their proceedings are adequate with substantially similar rules.

(e) *The Law Involved* — Well-settled state law is to be applied under *Erie.*

(f) *Avoidance of Piecemeal Litigation* — All parties to the subject contract are present in both courts. Only the subcontractors are absent in the federal action, and the viability of Lake's claim against them is doubtful.[2] In any event, Lake can join the contractors by crossclaim or third party complaint without destroying diversity. Fed. R. Civ. P. 13(h), 14 and 20. No piecemeal litigation would result if properly practiced.

The court of appeals took to heart the letter and the spirit of the guidelines set forth in *Colorado River*

[2]J.A. 105-07.

and *Moses H. Cone Hospital.* Each factor potentially favoring stay was carefully weighed and found without substance.[3] The facts compel concurrence here.

Absent circumstances justifying abstention and the rare exceptional circumstances invoking wise judicial administration, the unflagging obligation to proceed should have prevailed. Instead, the district court surrendered jurisdiction in disorderly retreat.

9. Discretion.

Lake invokes trial court discretion to defeat jurisdiction. Discretion is indispensable in the orderly adjudicatory processes of the court. But Lake's reliance on discretion to discard jurisdiction is badly misguided.

The statute itself grants jurisdiction based on diversity of citizenship alone. 28 U.S.C. § 1332. It is not dependent upon judicial concurrence or discretionary approval. Neither does the statute permit discretionary divestiture of jurisdiction once invoked. In short, Congress did not authorize jurisdiction to be affected by the discretionary act of the court involved. *Colorado River* made this clear. 424 U. S. at 814.

The only discretion afforded the trial judge affecting jurisdiction is in determining whether exceptional circumstances exist, and even that is reviewable. The very narrow exceptional circumstances outlined in *Colorado River* provide the limits of that discretion, and it must be exercised within that standard. *Moses H. Cone Hospital,* 460 U. S. at 19.

[3]*Id.*

We suggest that discretion is never a basis to decline jurisdiction. We urge that once jurisdiction is invoked, absent abstention, the judicial ship must commence its unceasing journey to adjudication. No jurisdiction conferred by the Congress permits otherwise. The district judge, as captain of the ship, must stay at the helm and maintain complete control. In guiding the ship through procedural waters, the captain must be mindful of his unflagging obligation to adjudicate.

The discretion that does exist is procedural discretion. The Congress may mandate jurisdiction, but it is within the province of the judiciary to carry out the adjudicatory process. Such is the nature of the separation of powers.

This Court well knows that two actions traveling parallel but different paths will encounter varying situations. The federal judge and the state judge, acting in comity. will need to exercise discretion to properly guide and control their respective proceedings. This discretion may invoke temporary deferral, early implementation, and other discretionary procedural variations to accomodate docket conditions, emergency situations, and the constantly changing procedural circumstances. These procedural discretions come within the framework of the congressionally conferred jurisdiction as a normal part of the adjudicatory process. Expediting or delaying a cause for procedural reasons is not tantamount to declining jurisdiction.

To obey the congressional jurisdiction mandate is for the district court to assume control and to travel relentlessly toward adjudication. The key to compliance with the congressionally imposed duty is to maintain control of the proceedings at all time — a "hands on" approach. Procedural delays, acceleration, accommodations and other discretionary procedural diversions are not the equivalent of refusal to assume jurisdiction. It is only when, as here, the district judge relinquishes control and abandons jurisdiction that the congressional mandate is violated. The fine line between discretionary delay and scuttling of jurisdiction must be decided on a case-by-case basis.

The "discretionary" aspect of jurisdiction has led to much confusion and some patent error, as in this instance. The discretion as to jurisdiction is constitutionally vested in the Congress, and not the courts. To decline jurisdiction based upon discretion is to invade the area constitutionally reserved to the Congress. No court can or should so encroach.

We would remind the Court that Congress may delegate discretion to the executive to perform congressional mandates. Similarly there is no reason why the Congress could not give the judiciary the discretion to assume or reject jurisdiction under congressional guidelines. However, the Congress has not seen fit to do so. In the absence of a congressional grant, the judiciary has no such jurisdictional discretion.

10. Diversity Jurisdiction

Lake would have this Court decline diversity jurisdiction because it has become burdensome and outmoded — that it has outlived what was contemplated and provided for by our founding fathers.

Congress established diversity jurisdiction in 1789. Judiciary Act of 1789, Ch. 20, § 3, 1 Stat. 73. Diversity jurisdiction has been in force, if not in vogue, ever since, despite perpetual attacks upon it.[4] The robust survival of this senior jurisdictional citizen establishes the congressional esteem it enjoys and the vitality it retains.

Lake suggests that there is no federal question present and, thus, exceptional circumstances exist permitting surrender of jurisdiction. Lake confuses diversity jurisdiction with federal question jurisdiction. The two were conferred separately by the Congress, and each stands alone. Federal question jurisdiction, a relative newcomer, was conferred in 1875. Act of March 3, 1875, § 1, 18 Stat. 470; currently 28 U.S.C. § 1331. Either will suffice for jurisdictional purposes.

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[4] *E.g.*, H.R. 2404, 97th Cong., 1st Sess. (1981) (a bill to abolish diversity jurisdiction); S. 679, 96th Con., 1st Sess. (1979) (a bill to modify diversity jurisdiction); H.R. 180, 96th Cong., 1st Sess. (1979) (a bill to abolish diversity jurisdiction); H.R. 2202, 96th Cong., 1st Sess. (1979) (same); H.R. 9622, 95th Cong., 1st Sess. (1977) (same); and such earlier bills as *e.g.*, S. 939, 72d Cong., 1st Sess. (1932) (a bill to limit jurisdiction of the United States district courts); H.R. 11508, 72d Cong., 1st Sess. (1932) (same); S. 4357, 71st Cong., 2d Sess. (1930) (same); S. 3151, 70th Cong., 1st Sess. (1928) (same).

Lake implies, and the district court held, that R&S was required to show "good reason" why its claim could not be properly heard in the state court.

The duty to show prejudice was required in some of the earlier diversity *removal* statutes dating back to the Act of March 2, 1867. 14 Stat. 558. This was eliminated as unnecessary in the 1948 revision of the Judicial Code. 28 U.S.C. § 1441. *See* C. Wright, *Handbook of the Law of Federal Courts,* at 86 (1976).

The legislative history establishes the congressional intent that a showing of prejudice not be required in original diversity actions. 28 U.S.C. § 1332.

State law is universally applied in all diversity cases. That is what *Erie* is all about. The presence of federal law is a factor favoring retention of jurisdiction, but its absence does not favor surrender in a diversity case. To hold otherwise would repeal 28 U. S. § 1332. *See Moses H. Cone Hospital,* 460 U. S. at 25-26.

Confusion in this area has created havoc. Unwarranted reliance on the absence of a federal question and misplaced emphasis on state law expertise where none was required led to a diversity stay under appellate compulsion in *Microsoftware Computer Systems* v. *Ontel Corp.,* 886 F. 2d 531, 537-38 (7th Cir. 1982). *See also, Voktas* v. *Central Soya Co.,* 689 F. 2d 103 (7th Cir. 1982); *Evans Transp. Co.* v. *Scullin Steel Co.,* 693 F. 2d 715 (7th Cir. 1982).

Given the tendency of counsel to create "exceptional circumstances," we can expect more and more such

confrontations with more and more diverse answers. The Court should address this issue.

Jurisdiction, its requirements and its extent, are political issues. That diversity jurisdiction is within the perimeter of federal judicial powers is settled by the Constitution. United States Constitution, article III, section 2, clause 1. The implementing of diversity jurisdiction has been settled by the Congress. 28 U.S.C. § 1332. The Congress has determined the political issue of diversity jurisdiction without reservation. In the words of Chief Justice Marshall in *Cohens:* "[w]e find no exception to this grant, and we cannot insert one." 19 U. S. at 404.

We need not defend diversity jurisdiction. But if defense is needed, we look no further than Chief Justice Marshall speaking for the Court in *Deveaux:*

> However true the fact may be that the tribunals of the States will administer justice as impartially as those of the nation to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

9 U. S. at 87.

We need only add that the words of Chief Justice Marshall are updated by the current 28 U.S.C. § 1332.

11. The Domino Effect on Other Jurisdictional Grounds.

Lake would single out diversity jurisdiction for discretionary surrender of jurisdiction where a prior concurrent state action is present. We deny that diversity jurisdiction is a senior citizens whose demise is long overdue. Remembering Mark Twain, we suggest that its death has been greatly exaggerated. At least, this Court should not be ready to administer last rites.

In each jurisdictional grant, the Congress has spelled out the requisites and given the federal judiciary its marching orders. Not once in the non-exclusive jurisdictional statutes has the Congress established a jurisdictional pecking order. We must assume that the Congress intends all jurisdictional grants to have equal protection by this Court and equal exercise by all courts. Accordingly, we submit that diversity jurisdiction, unpopular though it be to Lake, is entitled to equal implementation by this Court.

A troublesome aspect arises in other jurisdictional areas. Civil rights actions are growing as a subject for concurrent jurisdiction. Steinglass, *The Emerging State Court § 1983 Action,* 38 U. Miami L. Rev. 382 (1984). The instant situation can and soon will arise in civil rights actions. In such a case, can courts surrender jurisdiction to the state court through discretion or otherwise, or does the civil rights claimant have a right to a federal forum? The same situation will most certainly arise in many other federal question situations. R.I.C.O. jurisdiction may pose the same

problem. 18 U.S.C. § 1964. We could run the gamut of undiscussed concurrent jurisdictional grants, with the same questions but no answers.

The answer given here must be fashioned to fit all concurrent jurisdictional grants, establishing uniform guidelines for the circuits to follow. That answer must be: absent abstention, exercise of jurisdiction is compulsory with discretion available only in procedural matters.

12. The Burden of Proof.

The prior action pending defense is historically an affirmative defense raised by plea in abatement. 1 Am. Jur. 2d *Abatement* §§ 38, 39 (1965); 1. C.J.S. *Abatement* §§ 81, 191 (1940); *Sheppard* v. *Graves,* 55 U. S. (14 How.) 505, 510-11 (1852). As such, the party asserting abatement has the burden of establishing it. Under modern practice the proper method of seeking stay or abatement is by answer or motion. Fed. R. Civ. P. 8(e), 12(b) and 56.

Aside from the affirmative defense burden, the concurrent jurisdiction established by the Congress and the unflagging obligation to proceed impose a strong burden on the party seeking to thwart the court in the performance of its duty. The district court erred in holding otherwise.[5]

Here jurisdiction admittedly exists. With jurisdiction present, the burden of establishing the "exceptional circumstances," the "clearest of justifications,"

[5]J.A. 105.

is heavy indeed. *Moses H. Cone Hospital,* 460 U. S. at 26.

The burden of establishing exceptional circumstances was on Lake. The court of appeals correctly held there was no basis to support surrender.

13. Misconstrued Authorities.

The confusion and diverse results in the inferior courts are understandable. Given the ingenuity of counsel, exceptional circumstances are often found where none exist. Exceptional circumstances usually exist in the eye of the beholder. The broader the discretion, the more the jurisdictional problems are compounded. Numerous decisions by the district and circuit courts add to the confusion. A definitive decision here can remedy that.

Lake (and some of the inferior courts) have misconstrued certain decisions of this Court. The mainstream of concurrent jurisdiction and the views expressed here are consistent with these decisions. We discuss them briefly.

Will v. *Calvert Fire Insurance Company* was a mandamus proceeding to compel District Judge Will to proceed with a Securities Exchange Act claim. 437 U. S. 655 (1978).

> The key to Calvert was the standard for issuance of a writ of mandamus under 28 U.S.C. § 1651. As Justice Rehnquist stressed, such extraordinary writs are used in aid of appellate jurisdiction only to confine an inferior court to a lawful exercise

> of its prescribed authority, or to compel it to exercise its authority when it is its duty to do so.

Moses H. Cone Hospital, 460 U. S. at 18.

Justice Rehnquist held Calvert had not met the burden of proof required for mandamus. "At the same time, he noted that the movant might have succeeded on a proper appeal." *Id.* Viewed in that context, the language from *Will* is not persuasive here. Indeed, this court in *Moses H. Cone Hospital* reversed the stay as improper.

Brillhart v. *Excess Insurance Company* was a Federal Declaratory Judgment action. 316 U. S. 491 (1942). This Court there held declaratory judgment is discretionary by Congressional enactment. 28 U.S.C. § 2201. The discretion conferred by the Congress extends not only to whether the forum is appropriate, but also to whether the action should be entertained at all. *Mechling Barge Lines* v. *United States,* 368 U. S. 424 (1961). Properly viewed, *Brillhart* has no application here.

We would emphasize, however, that 28 U.S.C. § 2201 and *Brillhart* form a perfect example of a congressional grant of discretion to decline to adjudicate even where jurisdiction is present. But here we have mandatory jurisdiction, a justiciable controversy and no congressionally granted discretion to surrender jurisdiction.

CONCLUSION

This federal action, timely and properly filed, has been effectively precluded by trial court error and delay in the appellate process. Lake, which induced and maintained the erroneous stay, now asserts the state action has progressed to the point that "wise judicial administration" converts the error into a stroke of judicial genius. Brief for Petitioner, p. 19.

Lake, quick to litigate, won the race to the courthouse. Through error invited by Lake and appellate delay, Lake is approaching the finish line in its race to judgment. Yet it cautions against "an unseemly and destructive race to see which forum can resolve the same issues first." Brief for Petitioner, p. 11.

We do not know how it can be done. But if R&S has been wrongfully deprived of a federal forum, it should be placed in the procedural posture it enjoyed as of the entry of the stay order. A wrong inflicted by judicial error should be rectified by judicial ingenuity.

The opinion of the court of appeals, totally sound, should be affirmed.

Respectfully submitted,

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No. 84-1240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC. - - - Petitioner,

versus

ROBERTS & SCHAEFER COMPANY - Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONER

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The list of the parent corporation and corporate subsidiaries and affiliates of the Petitioner, required by Rule 28.1, Rules of the Supreme Court of the United States, is set forth in the Petition For Writ of Certiorari, at p. ii.

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

I. In Addition to its Expressed Powers, The Federal Courts, by Necessity, Have Implied Powers, Which Permit The Court to Refrain From Exercise of Jurisdiction Given Proper Circumstances.

Roberts & Schaefer Company, (hereinafter R&S), contends that a federal court having jurisdiction must exercise that jurisdiction and proceed to adjudication, absent a Congressional expression permitting the federal court to refrain from exercise of jurisdiction. Despite R&S's suggestions otherwise, its contention is not an absolute. This Court has "observed that the broad statement that a court having jurisdiction must exercise it, (see, *Cohen* v. *Virginia*, 6 Wheat 264, 404), is not universally true, but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of jurisdiction conferred upon them where there is no want of another suitable forum. Grounds justifying such a qualification have been found in considerations of convenience, efficiency and justice applicable to particular classes of cases." *Massachusetts* v. *Missouri*, 308 U. S. 1 (1939). Under these principles, this Court has recognized that a federal district

court may abstain from the exercise of jurisdiction where the order to repair to the state court would clearly serve an important countervailing interest. See, *Colorado River Water Conservation District* v. *United States,* 424 U. S. 800, 813-817 (1976), and the cases therein cited.

Absent a context of abstention, this Court has also recognized that a federal court may decline exercise of jurisdiction in deference to a parallel action pending in another federal court. *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.,* 342 U. S. 180, 183 (1952). In *Landis* v. *North American Company,* 299 U. S. 248 (1936), this Court declared that the federal court's powers are not limited to those expressly granted by Congress:

> ". . . the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.
>
> * * *
>
> We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions." at pp. 255-256.

It is therefore, apparent that the federal courts' inherent powers by necessity are not as limited in scope as R&S suggests in its brief.

Moreover, this Court has recognized that the federal courts may decline exercise of jurisdiction in deference to a concurrent action pending in state court. Mr. Justice Rehnquist in *Will* v. *Calvert Fire Insurance Company,* 437 U. S. 655 (1978), stated:

> "Such an automatic exercise of authority may well have been appropriate in a day when Congress had authorized fewer claims for relief in the federal courts, so that duplicative litigation and the concomitant tension between state and federal courts could rarely result. However, as the overlap between state claims and federal claims increased, this Court soon recognized that situations would often arise where it would be appropriate to defer to the state." at p. 663.

Perhaps recognizing this increase in duplicative federal-state litigation, the Court in *Colorado River Water Conservation District* v. *United States, supra,* dismissed a federal action in deference to a concurrent state action. Mr. Justice Brennan, writing for the Court, stated:

> ". . . there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions either by federal courts or by state and federal courts. These principles rest upon considerations of '[w]ise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation.' *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.,* 342 U. S. 180, 183 (1952)."

Although exceptional, Mr. Justice Brennan declared that such circumstances "do nevertheless exist." Id., at p. 816.

Again, writing for the Court in *Arizona* v. *San Carlos Apache Tribe of Arizona,* ____ U. S. ____, 103 S. Ct. 3201 (1984), Mr. Justice Brennan stated:

> ". . . although the federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them, 424 U. S. at 817, there were certain very limited circumstances outside the abstention context in which

dismissal was warranted in deference to a concurrent state court suit." at 3206.

Therefore, despite R&S's contrary contentions, it is well settled that the federal district courts, given proper circumstances, may refrain from exercise of jurisdiction in deference to a concurrent state action, as an exercise of their inherent powers.

A. MISCONSTRUED AUTHORITIES.

R&S's dependence on *Burgess* v. *Seligman,* 107 U. S. 20 (1883), *Cohens* v. *Virginia,* 19 U. S. (6 Wheat.) 264 (1821), *England* v. *Louisiana Medical Examiners,* 375 U. S. 411 (1964), and *Thermatron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336 (1976), is misplaced. We discuss their inapplication briefly.

In *Burgess* v. *Seligman, supra,* the Court held that the federal courts have a duty to interpret state statutes even in the absence of a prior state court interpretation. Therein, no concurrent state action was pending as in the case at bar.

In *Cohens* v. *Virginia, supra,* the Court held, upon a motion to dismiss for lack of jurisdiction, that where a party removes a judgment rendered against him in state court for purposes of determining whether the judgment violates the constitution, he does not bring a suit against the state so as to provide the court with jurisdiction. The question presented was whether the Court had jurisdiction, not whether it could refrain from exercise of jurisdiction.

In *England* v. *Louisiana Medical Examiners, supra,* the Court held that the federal courts have a duty to exercise and proceed with jurisdiction *where federal constitutional claims are presented.* In the case at bar there are no federal constitutional claims presented which mandate exercise of jurisdiction.

Thermatron Products, Inc. v. *Hermansdorfer, supra,* was an action to determine whether the district court could remand an action to state court for grounds other than as provided in 28 U.S.C. 1446, 1447. The question of remand has been properly disposed of in the present action and is not appealable. Moreover, there was no concurrent state action pending in *Thermatron Products, Inc.* v. *Hermansdorfer, supra,* as is present in the case at bar.

Properly viewed, the cases cited by R&S are restricted to the context in which they were presented and have no application herein. A federal court's duty to exercise jurisdiction, absent a concurrent state action or where federal constitutional claims are presented, differs dramatically when those circumstances are altered.

B. THE OBLIGATION TO EXERCISE JURISDICTION IS NOT ABSOLUTE.

The question then is not whether the federal courts have the power to refrain from exercise of jurisdiction, but whether the district court below abused its discretion in determining that exceptional circumstances exist herein which counsel against exercise of jurisdiction. It is not argued that the facts herein do not place this case within the context of the absentention doctrine. Nevertheless, the obligation to exercise jurisdiction is not unflagging, as R&S contends. The obligation is "virtually unflagging." *Colorado River Water Conservation District* v. *United States, supra.* The qualification of the obligation recognizes that exceptions exist. And in this action, exceptional circumstances do exist which, when balanced against the virtual obligation to exercise jurisdiction, counsel against that exercise.

II. Factors Which Counsel Against Exercise of Jurisdiction.

In *Colorado River Water Conservation District* v. *United States, supra,* Mr. Justice Brennan enumerated factors which a federal court could consider in assessing the appropriateness of a dismissal or stay in the event of an exercise of concurrent jurisdiction:[1]

a) the inconvenience of the federal forum;

b) the desirability of avoiding piecemeal litigation. *cf. Brillhart* v. *Excess Insurance Company,* 316 U. S. 491, 495 (1942); and,

c) the order in which jurisdiction was obtained by the concurrent forums.

In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Company,* 460 U. S. 1 (1983), Mr. Justice Brennan, again writing for the Court, added two factors for consideration:

a) the forum which provides the rule of decision on the merits; and,

b) the adequacy of the state court to completely and promptly resolve the issues between the parties.[2]

In *Arizona* v. *San Carlos Apache Tribe of Arizona, supra,* Mr. Justice Brennan, again writing for the Court,

[1]Additionally, Mr. Justice Brennan stated that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of all other courts. at 818. However, it is not questioned that the action in the state and federal courts herein is in personum.

[2]The Court also indicated that the order in which jurisdiction was obtained should not be measured exclusively by which complaint was first filed but also in terms of how much progress has been made in the two actions.

added a final factor for consideration: convenience to the parties.

As the Court expressed in *Colorado River Water Conservation District* v. *United States, supra,* 424 U. S. at 819, "no one factor is necessarily determinative." Instead, the test requires a careful consideration by the district court of the virtual obligation to exercise jurisdiction and the combination of factors counselling against that exercise. *Landis* v. *North American Company, supra.* Contrary to the arguments of R&S, the virtual obligation to exercise jurisdiction merely underscores this Court's recognition "that a district court should exercise its discretion with this factor in mind, but it in no way undermines the conclusion of *Brillhart* that the decision whether to defer to the concurrent jurisdiction of a state court is, in the last analysis, a matter committed to the district court's discretion." *Will* v. *Calvert Fire Insurance Company, supra,* 437 U. S. at 664.[3] Clearly, such discretion is not unlimited, but must be exercised under the relevant standards prescribed by this Court. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra.* However, although the exercise of that discretion is reviewable, it is not to be reversed absent a showing that the district court abused its discretion. *Id.*

[3]The fact that Mr. Justice Blackman in his concurring opinion in *Will* v. *Calvert Fire Insurance Company, supra,* held that the matter should be returned to the district court for its consideration under *Colorado River Water Conservation District* v. *United States, supra,* clearly demonstrates that the decision of whether to defer to the state court is necessarily left to the discretion of the district court.

III. The District Court Properly Found That Exceptional Circumstances Exist Which Counsel Against Exercise of Jurisdiction.

The district court below did not abuse its discretion in staying exercise of jurisdiction because exceptional circumstances exist which counsel against that exercise. Specifically, the district court enumerated two factors which, in its discretion, counselled against exercise of jurisdiction:

1) fairness to all parties concerned; and,

2) avoidance of multiplicity of judicial time and effort and piecemeal litigation. (J.A., at 80).

Additionally, other factors exist which, in combination, also counsel against exercise of jurisdiction:

1) state law provides the rule of decision on the merits; and,

2) the state court first obtained jurisdiction of the action.

A. AVOIDANCE OF PIECEMEAL LITIGATION.

R&S recognizes in its brief that because the federal action does not include all of the parties present in the state action, in order to obtain diversity jurisdiction, a decision in the federal court resolves only one facet of the dispute leaving the remaining issues for adjudication by the state court. Unless the federal action is stayed, piecemeal litigation will, of necessity, result.[4] Nevertheless,

[4]R&S suggests that Lake's claims against the domestic subsidiaries, omitted as parties in the federal action, are questionable. This is the same argument which R&S unsuccessfully raised in its response to Lake's motion to remand the removed action to state court. The district court found R&S's argument to be without merit and properly remanded the action. See, J. A. at 35.

R&S contends that Lake could make the domestic subsidiaries parties to the federal action and thereby avoid the piecemeal resolution of the issues which the parties presently face. Lake respectfully contends that this argument is without merit. First, Lake cannot join the domestic subsidiaries in the federal action as a matter of right, but must obtain leave of court. Fed. R. Civ. P. 14. Therefore, at this time it is uncertain whether the domestic subsidiaries can be made parties to the federal action. Secondly, Lake should not be compelled to forgo its state action against the domestic subsidiaries and litigate its claims in federal court when the state court first obtained jurisdiction of the matter and it was R&S which created the necessity for piecemeal resolution of the issues by filing a federal claim omitting necessary parties and issues in order to achieve complete diversity. R&S's argument is nothing more than an attempt to focus this Court's attention on imaginary cases in the hope that this Court will lose sight of the actual circumstances herein that piecemeal litigation is avoided by stay of the federal action.

In addition to avoiding piecemeal resolution of all the issues between all the parties, the stay of federal jurisdiction avoids duplicative judicial time and effort. Although R&S suggests that avoidance of duplicative judicial time and effort is of no consideration, in determining whether to exercise jurisdiction, this Court has indicated otherwise. See, *Colorado River Water Conservation District* v. *United States, supra,* and *Arizona* v. *San Carlos Apache Tribe of Arizona, supra.*[5] The Seventh Circuit Court of Appeals in

[5]Mr. Justice Brennan writing for the Court in *Arizona* v. *San Carlos Apache Tribe of Arizona, supra,* cited *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co., supra,* as authority for consideration

(Continued on next page.)

Microsoftware Computer Systems v. *Ontel Corp.*, 686 F. 2d 531 (7th Cir. 1982), a case very similar factually to the case at bar, stayed exercise of federal jurisdiction because, in combination with other factors:[6]

> ". . . there would be a grand waste of efforts by both the courts and parties in litigating the same issues regarding the same contract in two forums at once." at p. 538.

Moreover, the court therein warned that the maintenance of concurrent actions "will have a perceptable effect upon proceedings in the original action if the parties there attempt to accelerate or stall the proceedings in order to influence which court finishes first. The result would be quite similar to forum shopping and just as unseemly." *Id.*

(Continued from preceding page.)

of the factor of avoidance of piecemeal litigation. This case involved concurrent federal litigation wherein the Supreme Court approved the action of the district court in refraining from exercise of jurisdiction because it avoided duplicative judicial time and effort. Mr. Justice Rehnquist in *Will* v. *Calvert Fire Insurance Company*, 437 U. S. at 663, stated:

"Although most of our decisions discussing the propriety of stays or dismissals of duplicative actions have concerned conflicts of jurisdiction between two federal district courts, e.g., *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180 (1952); *Landis* v. *North American Company*, 299 U. S. 248 (1936); we have recognized the relevance of those cases in the analogous circumstances presented herein. See, *Colorado River*, 424 U. S., at 817-819."

[6]The court also held that because state law provided the rule of decision on the merits and the state court first obtained jurisdiction over the matter and was adequate to completely and promptly resolve the dispute, the federal action should be stayed pending the concurrent state action.

Similarly, Mr. Justice Brennan in *Arizona* v. *San Carlos Apache Tribe of Arizona, supra,* stated:

> ". . . concurrent federal proceedings are likely to be duplicative and wasteful. . . .
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> • • •
>
> . . . the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first—a race contrary . . . and prejudicial . . . to the possibility of reasoned decisionmaking by either forum." at p. 3214.[7]

In the present action, a determination of issues involving the design, installation and construction of the wash plant facility will be required in both the federal and state courts unless the federal action is stayed because the state action is more inclusive than the federal action in parties thereto and issues therein presented. Lake respectfully contends that the stay of the federal action not only avoids piecemeal adjudication of all of the issues and thereby conserves state and federal judicial resources, but it additionally heeds Mr. Justice Brennan's warning in *Arizona* v. *San Carlos Apache Tribe of Arizona, supra,* and avoids a "destructive race" to judgment.

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[7]R&S suggests that Lake was "quick to litigate" and "won the race to the courthouse." (R&S Brief, p. 25). The contract between the parties, which is the subject matter of this action, was breached by R&S on April 1, 1982. Thereafter, Lake gave R&S every reasonable opportunity to remedy the breach. However, after it became evident that R&S was unable or unwilling to remedy the breach and place the plant in working order, Lake exercised the only alternative available to it and filed the action in state court seven months after the breach occurred. There was no race to the courthouse.

B. STATE LAW PROVIDES THE RULE OF DECISIONS ON THE MERIT.

R&S admits in its brief that the presence of federal law is always a factor favoring retention of jurisdiction. However, it argues that its absence does not favor surrender in a diversity case. R&S's contention ignores Mr. Justice Brennan's statement in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra,* that where state law provides the rule of decision on the merits, that factor may weigh in favor of surrender of jurisdiction, in the absence of countervailing federal policies. at 25. See also, note 29. Also, in *Colorado River Water Conservation District* v. *United States, supra,* and *Arizona* v. *San Carlos Apache Tribe of Arizona, supra,* Mr. Justice Brennan indicated that the presence of the expertise of the state court in interpreting and applying state law was a factor counselling against exercise of jurisdiction. In *Brillhart* v. *Excess Insurance Company, supra,* Mr. Justice Frankfurter, writing for the court, recognized the significance of this factor:

> "Ordinarily, it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, *not governed by federal law,* by the same parties." (emphasis added). at 495.

The Seventh and Eleventh Circuits have also recognized that this factor counsels against exercise of federal jurisdiction in deference to the state forum. See, *American Manufacturer's Mutual Insurance Company* v. *Edward D. Stone, Jr.,* 743 F. 2d 1519 (11th Cir. 1984); *Microsoftware Computer Systems* v. *Ontel Corp., supra.* It is not necessary for the state law to be unsettled in order for this factor

to be significant. as R&S contends. Rather, it is apparent that it is the state court's greater familiarity and expertise with state law in all instances which counsels against exercise of jurisdiction. See, *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra,* and *Rogers* v. *Guaranty Trust Co. of New York,* 288 U. S. 123 (1933). Lake therefore, respectfully contends that this factor weighs in favor of the stay of federal jurisdiction in the case at bar.

This does not mean that in all diversity actions federal jurisdiction would be stayed in deference to a concurrent state action. In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra,* the intent of the federal arbitration act not to delay arbitration of disputes required exercise of federal jurisdiction even though the federal action was based on diversity jurisdiction. *Tai Ping Insurance Co. LTD* v. *M/V Warschau,* 731 F. 2d 1141 (5th Cir. 1984). Where underlying federal policy requiring exercise of federal jurisdiction is present, a litigant should not be compelled to try his case in state court.[8] *England* v. *Louisiana Medical Examiners, supra.* However, in the case at bar there are no issues of federal law nor underlying federal policy which requires exercise of jurisdiction.[9] Lake respectfully contends that the fact that the state law provides the rule of decision on the merits, absent underlying federal policy requiring exercise of jurisdiction, is

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[8]In requiring a federal court to exercise jurisdiction where there are federal constitutional claims or federal policies favoring exercise of jurisdiction present or where the state court is inadequate to fairly protect the rights of the parties, the Court has already established sufficient safeguards which prevent the "domino effect" which R&S fears.

[9]Lake does not confuse diversity jurisdiction and federal question jurisdiction as R&S contends.

significant herein, and in combination with other factors present, counsels against exercise of jurisdiction.

C. PRIORITY OF FILING.

The state court obtained jurisdiction of the action six months prior to the filing of the federal action. The case has now progressed, in its natural course, so that discovery is near completion and the trial is scheduled for November 4, 1985. The chronological priority in obtaining jurisdiction and the progress of the case in the state court, in combination with the other factors present, certainly counsel against exercise of federal jurisdiction. *Colorado River Water Conservation District* v. *United States, supra; Illinois Bell Telephone Company* v. *Illinois Commerce Com'n,* 740 F. 2d 566, 570 (7th Cir. 1984); *United States* v. *Adair,* 723 F. 2d 1394 (9th Cir. 1983), cert. denied, ____ U. S. ____, 104 S. Ct. 3536 (1984).

D. FAIRNESS TO ALL PARTIES CONCERNED.

The district court's expression that a factor counselling against exercise of jurisdiction was "fairness to all parties concerned," is a hybred factor which includes the adequacy of the state court to promptly and completely adjudicate the issues and the convenience to the parties. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corporation, supra; Arizona* v. *San Carlos Apache Tribe of Arizona, supra.* R&S does not argue that these factors are not present in the case at bar nor that their existence does not counsel against exercise of jurisdiction.

Additionally, the district court's expression demonstrates that it considered whether countervailing reasons existed requiring exercise of its jurisdiction even after Lake had demonstrated the existence of exceptional circumstances which counselled against that exercise.[10] Moreover, in view of R&S's consistent thoroughness throughout this action, its failure to raise any countervailing issues requiring exercise of jurisdiction, indicates that they do not exist herein.

E. AVOIDANCE OF VEXATIOUS LITIGATION.

One additional factor appears to exist herein which also counsels against jurisdiction: that the federal action is no more than a defensive tactical maneuver instituted by R&S for vexing and harassing Lake. R&S admits in its brief that the actions between the parties have been the equivalent of the Hatfield-McCoy feud. (R&S Brief, at p. 9). In *Calvert Fire Insurance Company* v. *American Mutual Reinsurance Company,* 600 F. 2d 1228, 1234 (7th Cir. 1979), the court held: "preventing a vexatious suit is similar to the interest in avoiding piecemeal litigation mentioned in *Colorado River, supra,* at 818, and would clearly justify federal deferral to the parallel state proceedings. . . ."

IV. The Sixth Circuit Opinion.

R&S suggests that the Court of Appeals' judgment, reversing the district court's stay of exercise of jurisdiction, was "totally sound." Lake respectfully contends that the Court of Appeals failed to recognize the presence of the exceptional circumstances in the within action which the district court properly held counsel against the exer-

[10]Although R&S has raised in passing the issue of prejudice in the state court, there is no indication whatsoever that R&S will be subject to any prejudice in the state court. (J. A., at 99). In fact, R&S did not even raise the issue of possible prejudice in the district court nor in the Court of Appeals, but for its motion for summary reversal which was denied by the Sixth Circuit. (J. A. at 102).

cise of jurisdiction. Its judgment is therefore error and requires reversal by this Court. Moreover, the appellate court's stay of its mandate indicates that it, too, in retrospect, questioned the "soundness" of its decision.

CONCLUSION

For the foregoing reasons and for those stated in its brief, the Petitioner respectfully requests that this Court reverse the judgment of the Sixth Circuit Court of Appeals and that the district court's order of stay be reinstated.

Respectfully submitted,

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